

**AGENDA – July 28, 1999 Business Taxes Committee Meeting**  
**Regulation 1620, Vehicles Used in Interstate and Foreign Commerce**

<p><b>Action 1 – Legislation vs. Attorney General Opinion vs. Regulatory Amendment vs. Annotation</b></p>	<p>Adopt:</p> <ol style="list-style-type: none"> <li>1) Staff's recommendation to sponsor legislation to exempt the sale or use of buses and vehicles (identified in Revenue and Taxation Code section 6388) which are used primarily in interstate or foreign commerce; or</li> <li>2) The proposal to request an opinion from the Attorney General to identify the existence of, and necessity for, statutory authority for exempting the use of buses in interstate or foreign commerce; or</li> <li>3) The proposal to amend Regulation 1620; or</li> <li>4) Direct staff to clarify the application of tax to property used in interstate or foreign commerce by annotation</li> </ol>
<p><b>Action 2 – Regulatory Amendment</b></p>	<p>If the Board adopts the proposal to amend Regulation 1620 in Action 1 above,</p> <p>Adopt either:</p> <ol style="list-style-type: none"> <li>1) Amendments to subdivision (b)(2)(B) of Regulation 1620, as drafted by staff (Exhibit 10, pages 1-3); or</li> <li>2) Amendments to subdivision (b)(3) of Regulation 1620, as proposed by the Association (Exhibit 6, pages 6-8)</li> </ol>
<p><b>Action 3 – Authorization to Publish</b></p>	<p>If the Board adopts either the regulatory language drafted by staff or the Association's proposed language in Action 2 above, direct staff to recommend publication of the language adopted.</p>

	Industry's Proposed Regulatory Language	Regulatory Language Drafted by Staff	Summary Comments
<b>ACTION 2, Regulatory Amendment</b>	<p>(b) Use Tax.</p> <p>(1) In General. Use tax applies with respect to any property purchased for storage, use or other consumption and stored, used, or consumed in this state, the sale of which is exempt from sales tax under this regulation.</p> <p>(2) Exceptions.</p> <p>(A) Use tax does not apply to property held or stored in this state for sale in the regular course of business nor to property held for the purposes designated in subparagraph (b)(5), below.</p> <p>(B) Use tax does not apply to property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce both within and without California and not exclusively in California.</p>	<p>(b) Use Tax.</p> <p>(1) In General. Use tax applies with respect to any property purchased for storage, use or other consumption and stored, used, or consumed in this state, the sale of which is exempt from sales tax under this regulation.</p> <p>(2) Exceptions.</p> <p>(A) Use tax does not apply to property held or stored in this state for sale in the regular course of business nor to property held for the purposes designated in subparagraph (b)(5), below.</p> <p>(B) Use tax does not apply to <u>the use of</u> property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used <del>continuously</del> <u>primarily</u> in interstate or foreign commerce both within and without California and not exclusively in California. <u>The use of property, including a vehicle, that is purchased for use in California under subdivision (b)(3) of this regulation, is nevertheless exempt from tax if the property is purchased for use, and used, in interstate or foreign commerce prior to its entry into this state, and is thereafter used primarily in interstate or</u></p>	<p>Industry's proposal is to revise Regulation 1620 to exempt buses used primarily in interstate or foreign commerce.</p> <p>Staff have received two additional responses from interested parties on this issue. The California Trucking Association (CTA) liked staff's recommendation that legislation be adopted, however, it felt that the Association's previous proposal addressed an immediate need, was realistic, and offered clarity and practicality. CTA also proposed that vehicle "time in use" and "lease contract revenues" be added as alternative means to calculate the degree of use in interstate commerce, but did not provide details demonstrating how these calculations would be made.</p> <p>The Sales and Use Tax Advisors, Incorporated agree that Regulation 1620 should be amended to create firm guidelines, but they feel that these amendments should apply to all vehicles, vessels, or aircraft brought into this state within 90 days of the purchase date and thereafter used partially inside and outside the state.</p>

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		<p><u>foreign commerce both within and without California.</u></p> <p><u>Property is "used primarily in interstate or foreign commerce" if, during the six-month period immediately following its first entry into California, it is used in interstate or foreign commerce more than one-half the time that it is used. A vehicle will also be regarded as "used primarily in interstate or foreign commerce" if, during the six-month period immediately following its first entry into California, more than one-half of the miles traveled by the vehicle during that six-month period are miles traveled in interstate or foreign commerce.</u></p> <p><u>For the use of property to qualify for the exemption, it must satisfy all the elements of the exemption, one of which is whether the use is in interstate or foreign commerce. Examples of what constitutes use in interstate or foreign commerce for purposes of that portion of the test include, but are not limited to, the following:</u></p> <p><u>1. A bus or truck is dispatched empty from another state or country to California, or from California to another state or country, to pick up a specific</u></p>	<p><b><u>Summary of Differences Between Industry and Staff Language</u></b></p> <p>1. <u>Placement of Revision.</u> Staff strongly disagrees with industry's proposal to amend subdivision (b)(3) of this regulation. Staff have drafted alternative regulatory language to subdivision (b)(2)(B) of this regulation.</p> <p>Staff's view is that subdivision (b)(2)(B) interprets the constitutional exemption for use in interstate commerce, whereas subdivision 1620(b)(3) interprets the basic use tax imposition statute regarding property purchased for use or used in California.</p> <p>The test for whether property is purchased for use in California (b)(3) and the test for whether the Commerce Clause of the United States Constitution prohibits taxation (b)(2)(B) clearly are separate tests, based upon separate statutory authority. They must be kept separate.</p>

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		<p><u>payload, and the payload then is transported to its destination, which may be within the borders of that state or country. (Example: Truck dispatched empty from Sacramento, CA to Reno, NV to transport specific cargo from Reno, NV to Elko, NV.)</u></p> <p><u>2. A truck or bus transports cargo or passengers between California and another state or country, or between two places within California travelling through another state or country. (Example: Bus carries passengers between Reno, NV and Sacramento, CA or from Truckee, CA to Bishop, CA travelling through Nevada.)</u></p> <p><u>3. A carrier operating wholly within California has regularly scheduled service picking up or feeding passengers arriving from or destined to another state or country to another form of transportation, be it plane, train, ship, or bus. (Example: Passengers, upon arriving at a California airport on an out-of-state flight, use an airport bus service or a bridge carrier for Amtrak to go to a bus or Amtrak station to then travel by bus or train to their destination in California.)</u></p> <p><u>4. A truck picks up cargo from a carrier that brought the cargo into California from another state or country, and transports the cargo solely within California to its destination in California.</u></p>	<p>2. <u>Purchased for Use in California.</u> The Association has proposed in their (b)(3) regulatory language that use of a bus one-half or more of the time in interstate commerce will be accepted as proof of an intent that the property was not purchased for use in California.</p> <p>Staff's position is that before you can determine whether the use of the bus in interstate commerce is exempt it must first be determined to be purchased for use in California under subdivision (b)(3) of Regulation 1620. Subdivision (b)(2)(B) deals with the determination of whether the use of property is exempt based upon interstate commerce use but <u>only</u> if it has already been determined under subdivision (b)(3) that the property was purchased for use in California.</p> <p>3. <u>"Property" vs. "Buses".</u> Because staff believes that there is no statutory basis to distinguish the use of buses from the use of other property used in interstate commerce, the regulatory language drafted by staff applies to all property, rather than only to buses,</p>

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		<p>Examples of what do not constitute use in interstate or foreign commerce include, but are not limited to, the following:</p> <p>1. <u>A bus or truck which has not been dispatched to pick up any specific payload and which carries no passengers or cargo travels from another state or country to California, or travels from California to another state or country. (Example: Bus deadheads back into California after taking tour group from California to another state where tour ended.)</u></p> <p>2. <u>A bus or truck is used to replace another bus or truck that had entered California carrying passengers or cargo from another state or country, where the replacement was necessary because of mechanical problems of the vehicle that had entered California, and the replacement bus or truck transports passengers or cargo within California, never leaving the state.</u></p> <p>3. <u>A truck transports cargo, which had been shipped by another carrier to a California warehouse from another state or country, from the warehouse to another place within California, never leaving the state.</u></p> <p>4. <u>A tour bus travels entirely within California carrying a tour group that</u></p>	<p>as proposed by the Association.</p> <p>4. <u>“Primary Use”</u>. Staff is of the opinion that primary use means more than 50 percent, as illustrated in their regulatory language. The Association is of the opinion that primary use, as illustrated in their proposed language in subdivision (b)(3) is one half or more. Staff’s view is that primary use is a use greater than equal use.</p> <p>5. <u>Time vs. Mileage</u>. For consistency with other regulatory language, staff believes that time should be the primary measure for interstate commerce use, however the regulatory language drafted by staff allows for measurement by both time and mileage. The language proposed by the Association only allows measurement by mileage.</p> <p>6. <u>Clarifying Examples</u>. Staff and the Association agree to include clarifying examples. The regulatory language drafted by staff includes examples of what activities would constitute interstate and intrastate commerce use. The Association’s proposal only includes examples of</p>

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	<p>(C) Use tax, however, does not apply to certain new motor vehicles purchased for subsequent delivery to a foreign country and so delivered pursuant to paragraph (b)(2)(D) of Regulation 1610 (18 CCR 1610).</p> <p>(3) Purchase for Use in this State. Property delivered outside of California to a purchaser known by the retailer to be a resident of California is regarded as having been purchased for use in this state unless a statement in writing, signed by the purchaser or the purchaser's authorized representative, that the property was purchased for use at a designated point or points outside this state is retained by the vendor.</p> <p>Notwithstanding the filing of such a statement, property purchased outside of California which is brought into California is regarded as having been purchased for use in this state if the first functional use of the property is in California. When the property is first functionally used outside of California, the property will</p>	<p><u>contracted for the tour in another state or country and that traveled to California via plane, train, or ship from another state or country.</u></p> <p>(C) Use tax, however, does not apply to certain new motor vehicles purchased for subsequent delivery to a foreign country and so delivered pursuant to paragraph (b)(2)(D) of Regulation 1610 (18 CCR 1610).</p> <p>(3) Purchase for Use in this State. Property delivered outside of California to a purchaser known by the retailer to be a resident of California is regarded as having been purchased for use in this state unless a statement in writing, signed by the purchaser or the purchaser's authorized representative, that the property was purchased for use at a designated point or points outside this state is retained by the vendor.</p> <p>Notwithstanding the filing of such a statement, property purchased outside of California which is brought into California is regarded as having been purchased for use in this state if the first functional use of the property is in California. When the property is first functionally used outside of California, the property will</p>	<p>activities that would constitute interstate commerce use.</p>

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	<p>nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless the property is used or stored outside of California one-half or more of the time during the six-month period immediately following its entry into this state. Prior out-of-state use not exceeding 90 days from the date of purchase to the date of entry into California is of a temporary nature and is not proof of an intent that the property was purchased for use elsewhere. Prior out-of-state use in excess of 90 days from the date of purchase to the date of entry into California, exclusive of any time of shipment to California, or time of storage for shipment to California, will be accepted as proof of an intent that the property was not purchased for use in California. <u>Buses purchased outside of California which are brought into California are regarded as having been purchased for use in this state if the first functional use of the bus is in California. When the bus is first functionally used outside of California, the bus will nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless one-half or more of the miles traveled by the bus during the</u></p>	<p>nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless the property is used or stored outside of California one-half or more of the time during the six-month period immediately following its entry into this state. Prior out-of-state use not exceeding 90 days from the date of purchase to the date of entry into California is of a temporary nature and is not proof of an intent that the property was purchased for use elsewhere. Prior out-of-state use in excess of 90 days from the date of purchase to the date of entry into California, exclusive of any time of shipment to California, or time of storage for shipment to California, will be accepted as proof of an intent that the property was not purchased for use in California.</p>	

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	<p><u>six month period immediately following its entry into this state are miles traveled in interstate commerce. Such use will be accepted as proof of an intent that the property was not purchased for use in California. Examples of what constitutes interstate commerce include, but are not limited to the following:</u></p> <p>1. <u>A sightseeing tour bus group (charter) or regularly scheduled bus service (per capita) originates in California and travels to another state or country for a single day or several days then returns to California where the charter or schedule terminates.</u></p> <p>2. <u>A charter bus deadheads under contract to another state, picks up the group and operates the charter without entering the state of California, drops the group in the other state, and deadheads back into the state of California. (Charter was quoted round trip.)</u></p> <p>3. <u>A charter bus group tours under contract to another state or country for a day or several days then drops the passengers in the other state or country and then dead heads back under contract to its terminal or next assignment.</u></p>		



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	<p><u>4. A sightseeing tour bus group (charter) arrives in California via plane, train, or ship is picked up by bus and tours California for a number of days and then goes to another state or country for a number of days and then terminates service either in another state, country or California.</u></p> <p><u>5. A sightseeing tour bus group (charter) or regularly scheduled bus service enters California in bus #1, and bus #1 has a road failure which causes bus #2 to continue the trip while bus #1 is being mechanically repaired. Bus #2 would be in interstate commerce as a continuation intent of the character of the original trip.</u></p> <p><u>6. Regularly scheduled services where a carrier operating wholly within California is picking up or feeding passengers arriving from or destined to a state or country other than California to another form of transportation be it plane, train, ship, or bus. (Example: an airport bus service or a bridge carrier for Amtrak.)</u></p> <p>For purposes of this subparagraph "functional use" means use for the purposes for which the property was designed.</p>	<p>For purposes of this subparagraph "functional use" means use for the purposes for which the property was designed.</p>	

Issue Paper Number

099-019



BOARD OF EQUALIZATION  
**KEY AGENCY ISSUE**

- ☐ Board Meeting
- ☒ Business Taxes Committee
- ☐ Customer Services Committee
- ☐ Legislative Committee
- ☐ Property Tax Committee
- ☐ Technology & Administration Committee
- ☐ Other

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## **REGULATION 1620 - VEHICLES USED IN INTERSTATE AND FOREIGN COMMERCE**

### **I. Issue**

Should subdivision (b)(3) of Sales and Use Tax Regulation 1620 be amended, as proposed by the California Bus Association (association), to expand the exemption for the use of buses in interstate or foreign commerce?

### **II. Staff Recommendation**

Staff recommends specific legislation be proposed to provide a statutory exemption from sales as well as use tax for the use in interstate or foreign commerce of buses and vehicles identified in Revenue and Taxation Code section 6388. This new exemption should be similar to the current statutory exemptions provided for aircraft in Revenue and Taxation Code sections 6366 and 6366.1, watercraft in Revenue and Taxation Code sections 6368 and 6368.1, and rail freight cars in Revenue and Taxation Code section 6368.5, and would expand the exemption beyond the exemption currently provided by Revenue and Taxation Code section 6352.

### **III. Other Alternative(s) Considered**

1. That the Board request an opinion from the Attorney General to identify the existence of, and necessity for, statutory authority for exempting the use of buses in interstate or foreign commerce from California use tax.
2. That amendments to subdivision (b)(3) of Regulation 1620 be adopted as proposed by the association in its July 2, 1999 letter.
3. If the Board concludes that statutory authority is not necessary to make the proposed changes to Regulation 1620, staff recommends that amendments to subdivision (b)(2)(B) of Regulation 1620 be adopted as drafted by staff.

## **IV. Background**

### Introduction

Prior to the current discussions, the association had proposed that Regulation 1620 be amended.<sup>1</sup> This proposal was considered by the Business Taxes Committee at its August 26, 1998 meeting. At this meeting, the Business Taxes Committee decided not to amend the regulation but rather to proceed with an oral hearing on a specific petition on the same subject. The Board subsequently granted relief to the taxpayer in that matter based upon Revenue and Taxation Code section 6596, and staff was directed to clarify the application of tax by annotation.

Staff is in the process of preparing written clarification to relevant industry groups to advise them that to qualify for exemption under subdivision (b)(2)(B) of Regulation 1620, the vehicles in question must have a continuing uninterrupted use in interstate commerce<sup>2</sup>. The Board's Legal Division plans to annotate this letter. (A draft of the content of this clarification is provided as Exhibit 3.)

Nevertheless, without specific revisions to Regulation 1620, the association continues to believe that uncertainty exists regarding (1) the application of tax to vehicles first functionally used outside California but deemed purchased for use in California and (2) the definition of "used in interstate commerce." Therefore, the association has again proposed changes to the regulation.

During the current discussions, the association initially proposed that subdivision (b)(2)(B) of Regulation 1620 be amended, as illustrated in its letter dated April 20, 1999. The proposal was that the use of property (including vehicles) in California would be exempt from use tax if 50 percent or more of its use during the six-month period immediately following its first entry into California was in interstate commerce. This proposal did not limit the type of property for exemption to buses. In its June 2, 1999 letter, the association proposed that the definitions of interstate and intrastate commerce in the California Public Utilities Code, for purposes of regulating the bus industry by the California Public Utilities Commission (CPUC), or definitions of these terms in the United States Code be used in Regulation 1620. The association also proposed that the six-month test period commence on the date of delivery rather than the date the vehicle first enters California. (The complete text of these proposals are attached as Exhibits 4 and 5.) The association's proposals from the April 20, 1999 and June 2, 1999 letters can be summarized as:

- (1) remove the requirement that a vehicle be "continuously" used (at all times) in interstate commerce, and instead require a vehicle be "primarily" used (one half or more of the time) in interstate commerce during a six-month test period;

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<sup>1</sup> Staff has previously prepared issue papers on this issue as follows: Issue Paper 98-004R2, dated August 11, 1998; Issue Paper 98-004R, dated April 22, 1998; and Issue Paper 98-004, dated March 5, 1998.

<sup>2</sup> Although there can be different ramifications with respect to property used in interstate commerce and property used in foreign commerce, in the context of this issue paper they are treated the same. Thus, for purposes of this issue paper, the use of the term "interstate commerce" means interstate and foreign commerce.

- (2) eliminate the regulation's measurement of use in interstate commerce in terms of time and replace it with a measurement of use based on miles driven;
- (3) define interstate commerce using the definition in the California Public Utilities Code and/or United States Code; and
- (4) include clarifying examples of what activities would and would not constitute interstate commerce use of vehicles.

In its July 2, 1999 letter, the association withdrew its previous proposals discussed above and substituted a proposal that would amend subdivision (b)(3) of Regulation 1620. This proposal would change the definition of what constitutes "purchased for use in California" for purposes of Revenue and Taxation Code section 6201, the statute imposing the use tax. The proposal is limited to the use of buses, rather than the use of any property. Accordingly, under the association's proposal, trucks, tractors, and trailers would be treated differently than buses. Under this proposal, a bus used principally in interstate commerce (similar to the association's previous proposal to amend subdivision (b)(2)(B)), would not be regarded as having been purchased for use in California even if the bus was used substantially within this state. (The complete text of the association's current proposal is attached as Exhibit 6.)

The association is of the opinion that the Board possesses quasi-legislative authority to make the proposed amendment via a direct revision to Regulation 1620, without a statute authorizing the exemption. If the existence of a statute is necessary in order to make the amendment, the association is of the opinion that Revenue and Taxation Code section 6201 provides the basis for the exemption.

As part of the Business Taxes Committee issue paper process, the Revised Discussion for Issue Paper was distributed to interested parties on June 17, 1999. As a result of this discussion paper, responses were also received from the California Trucking Association (CTA) and Sales and Use Tax Advisors of California, Incorporated (SUTA), each dated July 2, 1999.

While the CTA liked staff's recommendation that legislation be adopted to exempt the sale or use of buses and other specified vehicles, it felt that the association's now withdrawn proposals (as illustrated in letters dated April 20, 1999 and June 2, 1999) addressed an immediate need, were realistic, offered clarity and practicality in application, and were supported by the 1994 view of Congress on the Commerce Clause. The CTA also proposed that vehicle "time in use" and "lease contract revenues" be added as alternative means to calculate the degree of use in interstate commerce, but did not provide details demonstrating how these calculations would be made. (The complete text of this response is attached as Exhibit 7.)

In its letter dated July 2, 1999, the SUTA noted its concern with regard to inconsistent treatment with regard to when a vehicle, vessel, or aircraft is purchased for use in California. It noted that the problems that exist for how days are counted with respect to sightseeing buses also exist for all other types of vehicles, as well as for vessels and aircraft. Thus, while SUTA agrees that Regulation 1620 should be amended to create firm guidelines to be used, it believes that the changes should apply to all vehicles, vessels, or aircraft that are brought into the state within 90 days of the purchase date and are, thereafter, partially used inside the state and partially used outside the state, in order to eliminate inconsistent treatment. (The complete text of this response is attached as Exhibit 8.)

### Current Application of Tax Under Regulation 1620(b)(2)(B) to Vehicles Used in Interstate Commerce

The first part of the analysis is to determine whether the vehicle is purchased for use in California. Under Revenue and Taxation Code section 6248, it is presumed that a vehicle purchased outside California which is thereafter brought into this state within 90 days is purchased for use in this state. As explained in subdivision (b)(3) of Regulation 1620, this presumption can be rebutted for a vehicle that is first functionally used outside California by showing that the vehicle was used or stored outside this state one-half or more of the time during the six-month period immediately following its first entry into this state. The regulation applies these rules to all property (not just vehicles) so that the determination of whether property is purchased for use in California is made in the same manner whether the property is a vehicle, an aircraft, or a television set. If a vehicle is not purchased for use in California under the guidelines of subdivision (b)(3) of Regulation 1620, no California use tax applies, without regard to interstate use of the vehicle, since any use in California would not come within the taxing statute, Revenue and Taxation Code section 6201.

If the vehicle is regarded as having been purchased for use in California under Regulation 1620(b)(3) as discussed above, tax applies unless the use in this state qualifies for the exemption for use in interstate commerce as set forth in subdivision (b)(2)(B) of Regulation 1620. To qualify for this exemption, a vehicle must first be functionally used outside this state prior to its entry into California. (Vehicles which are purchased for commercial use are considered “functionally used” when used for the commercial purpose for which they were designed, such as hauling passengers or goods.) Upon entry into California, the vehicle must be used *continuously* in interstate commerce both within and without California, *and not exclusively in California*, for the next six consecutive months, without any intrastate use. If so used, use tax does not apply.

### History of Current Application of Tax on Vehicles Used in Interstate Commerce

The statutory authority for subdivision (b)(2)(B) of Regulation 1620 is Revenue and Taxation Code section 6352 which provides an exemption for the use of property in California when the United States Constitution prohibits such taxation. Thus, the goal of this regulatory provision when adopted was to provide an exemption only to the extent that the imposition of tax would violate the United States Constitution. Prior to 1977, the opinions of the United States Supreme Court interpreting the Commerce Clause of the United States Constitution imposed strict prohibitions against the imposition of use tax in the context of property used in interstate commerce. The wording of subdivision (b)(2)(B) of Regulation 1620 is consistent with the analysis of these pre-1977 Supreme Court opinions, providing an exemption from use tax for the use of property in interstate commerce provided the property is used *continuously* in interstate commerce, with no intrastate use or storage. The exemption has never applied if there is any wholly intrastate use or storage.

In 1977, the U.S. Supreme Court modified its interpretation of the Commerce Clause in the case of *Complete Auto Transit, Inc. v. Brady* (1977) 430 US 274, 51 L.Ed.2d 326, reh den 52 L.Ed.2d 371. In *Complete Auto Transit*, the Supreme Court held that the Commerce Clause of the Constitution does not prohibit state taxation of interstate commerce if all elements of a “four-pronged test” are met. At the time the Supreme Court issued this opinion, it was not known whether its four-pronged test applied only to the tax at issue in that case or if it also applied to

other taxes. Regulation 1620 was amended in 1978 to add to subdivision (b)(2)(B) the concluding phrase “both within and without California and not exclusively in California.” After this addition, a continuous interstate use exclusively in California (similar to Complete Auto Transit’s interstate business carried on exclusively in Mississippi) was no longer excluded from tax. In light of the uncertainty as to the meaning of *Complete Auto Transit*, no additional changes were made to Regulation 1620 at that time.

In a later case, the Supreme Court squarely addressed the issue of the test to be applied when the Commerce Clause was alleged to prohibit the imposition of a use tax on a transaction in interstate commerce. (*D.H. Holmes Co. v. McNamara* (1988) 486 US 24, 100 L.Ed.2d 21.) The Court stated that “the application of Louisiana’s use tax to Holmes’ catalogs does not violate the Commerce Clause if the tax complies with the four prongs of *Complete Auto*.”

Only after the U.S. Supreme Court decided *Holmes* was it clear that the imposition of use tax was forbidden by the Commerce Clause only if it failed the four-pronged test of *Complete Auto Transit*. In *Holmes*, the Court found (1) substantial nexus, (2) the Louisiana use tax to be fairly apportioned because it provided a credit against its use tax for sales taxes that have been paid to other states, (3) the use tax not to discriminate against interstate commerce because the use tax is designed to compensate the state for revenues lost when residents purchase out of state goods for use within the state, and (4) the use tax to be fairly related to the benefits provided by the state, which provided fire and police protection, mass transit, maintenance of public roads, and supplied a number of other civic services from which the taxpayer benefited.

Notwithstanding the Supreme Court cases clarifying the extent of tax prohibition under the Commerce Clause, subdivision (b)(2)(B) of Regulation 1620 has not been further amended. Accordingly, use tax has not been imposed on the use of property in interstate commerce if the property is so used prior to its entry into California and is thereafter continuously used in interstate commerce based on the specific language of subdivision (b)(2)(B) of Regulation 1620. But for the specific wording of subdivision (b)(2)(B) of Regulation 1620, purchases of property used in interstate commerce would be subject to tax on the same basis as any other property.

## **Discussion of the Issues**

### Statutory Authority

Tax applies to the sale or use of tangible personal property in California unless (1) the State Legislature has enacted a statute that exempts the sale or use, or (2) the sale or use is immune from state taxation under federal law. There is no express California statutory exemption for the use of buses in interstate commerce, as there is for rail freight cars and watercraft, or for use as common carriers as there is for aircraft. There is also no federal exemption or immunity for the use of such buses.

Transactions may be immune from state taxation by virtue of acts of Congress or by the express terms of the U.S. Constitution or as interpreted by the courts. While transactions immune from state taxation by virtue of federal law are immune from taxation whether or not the states have enacted those immunities into their taxing statutes as express exemptions, Revenue and Taxation Code section 6352 incorporates federal immunities from taxation *directly* into California’s Sales and Use Tax Law. This section provides an exemption for sales and uses that “this State is

*prohibited* from taxing under the Constitution or laws of the United States....” (Emphasis added.)

As a result of a series of U.S. Supreme Court decisions, it is now evident that there are no federal constitutional provisions “prohibiting” taxation of any of the transactions involving the use of buses in this state. Thus, use tax applies pursuant to Revenue and Taxation Code section 6201, the use tax imposition provision. Under California Constitution Article III, Section 3.5, the Board may not declare a statute unenforceable on the basis of its being unconstitutional unless an appellate court has made that determination. There is no appellate court decision declaring taxation of buses used in interstate commerce unconstitutional.

*Legislative Exemption.* Once the Legislature has provided a statutory exemption from tax, the Board may interpret the language of that statute and adopt regulations explaining the statutory exemption. (Rev. & Tax. Code §7051.) However, without such statutory basis, there is nothing for the Board to interpret since “[e]xemptions from taxation must be found in the statute.” *Market St. Ry. v. Cal. State Board of Equalization* (1955) 137 Cal.App.2d 87, 96. “It is well settled in the field of taxation that tax exemptions and deductions are solely a matter of legislative grace.” *Hotel Del Coronado Corp. v. State Board of Equalization* (1971) 15 Cal.App.3d 612, 617.

The association is of the opinion that the amendments they have proposed can be made as a direct revision to Regulation 1620, without specific statutory authority. The association believes that regulatory interpretations can be made via a regulation revision without benefit of specific statutory authority and that staff’s continued recommendation for statutory authority may be a preference but not a necessity. In its July 2, 1999 letter (Exhibit 6), the association has cited several sources that discuss the authority granted to the Board to adopt regulations necessary for the administration, implementation, and interpretation of the Sales and Use Tax Law.

Staff agrees with the association’s assertion in its July 2, 1999 letter that the Board may exercise discretion in adopting rules and regulations to implement, interpret or make specific provisions of the California Sales and Use Tax Law, but *only if the discretion is exercised within the scope of the controlling statute*. For example, the Legislature provided an exemption for the sale or use of watercraft if, among other things, “the watercraft is for use in interstate commerce involving the transportation of property or persons for hire.” (Rev. & Tax. Code § 6368.) Using this existing controlling statute, in Regulation 1594, the Board exercised its discretion to interpret the language in this statute, further explaining that tax will not apply if the principal use of the watercraft is transportation for hire in interstate commerce during a specified time after its first use. However, the Board did not have the discretion to adopt the exemption provided by section 6368 in the absence of that statutory basis for the exemption.

*Federal Prohibition.* The Board may adopt regulations identifying transactions immune from tax by virtue of federal legislative action or federal judicial interpretation and thus exempt from tax under Revenue and Taxation Code section 6352. The U.S. Supreme Court, however, is the final authority on whether the U.S. Constitution or federal laws prohibit the taxation of a transaction, and the views of the U.S. Supreme Court are not static and may change over time. The very thing happening here – a change in the opinion of the U.S. Supreme Court – has happened before. The Supreme Court at one time had adopted the “original package” doctrine that held that the U.S. Constitution prohibited states from taxing goods in their original package, and this doctrine was

set forth in Regulation 1620. When the U.S. Supreme Court abandoned the original package doctrine in *Michelin Tire Corporation v. Wages* (1976) 423 U.S. 726, the Board then amended its regulation on July 27, 1976 noting that the “original package” doctrine was overruled and the sale or use of these goods, formerly exempt from tax, now were subject to tax.

Sometimes a change in the Supreme Court’s views is an explicit reversal of direction such as in the case of the “original package” doctrine, and at other times the change is an evolutionary one. For example, the Court had long held that states could not impose a tax that burdened interstate commerce, the operation of interstate commerce or the use of an instrumentality in interstate commerce, but it allowed tax to be imposed when there was a break in interstate commerce and an intrastate use - a “taxable moment.”<sup>3</sup> Then, in 1977, the Court held that a state tax on the “privilege of doing business” in Mississippi was not unconstitutional under the Commerce Clause merely because it was applied to movement in interstate commerce, stating that interstate commerce may be required to pay its fair share of state taxes. (*Complete Auto Transit v. Brady Inc.* (1977) 430 US 274, 51 L.Ed.2d 326.) In *Complete Auto Transit*, Mississippi had imposed a tax on Complete Auto Transit’s in-state transportation of vehicles to Mississippi dealers. These vehicles were manufactured out of state and brought into the state by rail cars. Complete Auto Transit’s activities took place solely within the state, but were interstate activities because they completed the interstate trip of the vehicles shipped from out of state to the Mississippi dealer. Finding that the activities (1) had a sufficient nexus with the state, (2) were fairly related to the benefits provided by this state, (3) did not discriminate against interstate commerce, and (4) were fairly apportioned, the Court upheld this tax on the privilege of doing business.

In *D.H. Holmes Co. v. McNamara* (1988) 486 US 24, 100 L.Ed.2d 21, the Supreme Court squarely addressed the issue of the test to be applied when the Commerce Clause was alleged to prohibit the imposition of a use tax on a transaction in interstate commerce. The Court stated that “the application of Louisiana’s use tax to Holmes’ catalogs does not violate the Commerce Clause if the tax complies with the four prongs of *Complete Auto*.”

Only after the U.S. Supreme Court decided *Holmes* was it clear that the imposition of use tax was forbidden by the Commerce Clause only if it failed the four-pronged test of *Complete Auto Transit*. In *Holmes*, the Court found (1) substantial nexus, (2) the Louisiana use tax to be fairly apportioned because it provided a credit against its use tax for sales taxes that have been paid to other states, (3) the use tax not to discriminate against interstate commerce because the use tax is designed to compensate the state for revenues lost when residents purchase out of state goods for use within the state, and (4) the use tax to be fairly related to the benefits provided by the state, which provided fire and police protection, mass transit, maintenance of public roads, and supplied a number of other civic services from which the taxpayer benefited.

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<sup>3</sup> See *Southern Pacific Co. v. Gallagher* (1939) 306 US 167, 83 L.Ed. 856 sustaining California’s tax on storage and use of railroad equipment and supplies in which the interstate movement was complete and the interstate consumption had not yet begun; see also the following California cases sustaining application of use tax upon finding a moment of intrastate storage or use (even in circumstances where substantially all use was in interstate commerce): *Union Oil Company of California v. State Bd. of Equalization* (1963) 60 Cal.2d 411; *Chicago Bridge & Iron Company v. Johnson* (1941) 19 Cal.2d 162; *Western Pacific Railroad Company v. State Bd. of Equalization* (1963) 213 Cal.App.2d 20; *The Atchison, Topeka & Santa Fe Railway Co. v. State Bd. of Equalization* (1956) 139 Cal.App.2d 411.



The California Court of Appeal has recently applied the now well-established four-pronged test of *Complete Auto Transit* to a California use tax transaction which the Board claimed met all four prongs of the test and the taxpayer asserted violated one prong of the four-prong test. (See *Yamaha Corporation of America v. State Board of Equalization* (6/29/99) 1999 Daily Journal D.A.R. 6865.) It is clear that this four-pronged test is the proper test to apply to the association's claim that a transaction is not subject to California use tax based on the Commerce Clause of the United States Constitution.

Applying the current U.S. Supreme Court interpretation of the Commerce Clause, use tax may be imposed on the use of buses in California which are purchased outside of California for use in California (e.g., they enter California within 90 days of purchase and are physically present in California more than one-half of the time during the first six months following entry), even if the buses are used wholly in interstate commerce. Under such circumstances, the imposition of use tax has a substantial nexus with California, is fairly apportioned (being both internally and externally consistent), does not discriminate against interstate commerce, and is fairly related to benefits provided by the state.

Accordingly, staff believes that specific statutory authority must be adopted to exempt the use of buses in interstate commerce in order to achieve the results desired by the association. The statutory exemption proposed by staff (Exhibit 9) would not only address the use of buses in California for interstate transportation, which is of main concern to the association, but would also cover the similar use of other vehicles, such as trucks, truck tractors, semitrailers or trailers, any of which has an unladen weight of 6,000 or more, and auxiliary dollies. In addition, staff's recommendation of statutory exemption would provide an exemption from both the sales tax and use, whereas the association's proposal provides only an exemption from use tax and only for buses. Furthermore, the staff's recommendation provides the statutory basis necessary to distinguish between interstate use of the specified vehicles while the association's proposal lacks a statutory basis for exempting only the use of buses in interstate commerce.

By providing an exemption from both sales and use tax via statutory authority, retailers in California would have an equal opportunity for potential sales of these vehicles and would not be placed at an economic disadvantage in relation to out-of-state retailers. Providing only an exemption from use tax via the association's proposed regulation revision would give out-of-state retailers an economic advantage over California retailers of these types of vehicles.

As noted in the response from the California Trucking Association, staff's proposal for a statutory exemption from sales and use tax for defined trucks and buses used in interstate commerce would return to California the manufacturing and sales activity that now takes place outside the state. The California Trucking Association firmly believes that California would receive greater tax revenues by exempting sales of these types of vehicles through the adoption of statutory authority and enlarging the state's economic base.

#### Use of Revenue and Taxation Code Section 6201 as Statutory Authority

Staff asserted in the Revised Discussion for Issue Paper on Regulation 1620 that before there can be a regulatory interpretation, there must be existing controlling statutory language to interpret. The statute on which subdivision (b)(2)(B) of Regulation 1620 is based is Revenue and Taxation

Code section 6352, and the exemption set forth in that regulatory provision is based on the requirements of the United States Constitution as the Board understood those requirements in 1978. Since the Constitution does not prohibit the taxation of the use of buses under the association's proposal, the staff's view was (and is) that there is no statutory basis for amending the regulation as the association had proposed.

In its most recent submittal, the association relies on Revenue and Taxation Code section 6201 as the statutory authority for its proposed amendment to exclude from the use tax the use of a bus in California that travels one-half or more of its miles in interstate commerce during the six months following its entry into this state. The association states that the purpose of its proposed amendment is to further interpret and make specific what constitutes a purchase for use in this state.

Under Revenue and Taxation Code section 6201, an excise tax is imposed on the storage, use or other consumption *in this state* of tangible personal property purchased from any retailer for storage, use, or other consumption *in this state*. Section 6201 focuses on the *location* of the storage or use (i.e., inside this state versus outside this state), not on the *character* of that storage or use (i.e., intrastate versus interstate commerce). Even if a bus is purchased for use entirely in interstate commerce, it cannot be said that the bus is not purchased for use *somewhere*. There must be a physical location of use of the bus, and whether it is for use in interstate commerce does not resolve the issue of the physical location of use of the bus. Therefore, staff's position is that Revenue and Taxation Code section 6201 is not a valid basis for the association's proposal to provide an exemption for the use of buses when they are used primarily in interstate commerce. Accordingly, staff continues to believe that there is no statutory basis, and thus no basis for the exercise of discretion by the Board, to adopt the regulatory amendments proposed by the association as well as the regulatory amendments drafted by staff.

In fact, the Legislature has adopted statutory exemptions for the otherwise taxable use of certain property in interstate commerce. For example, the Legislature adopted Revenue and Taxation Code sections 6368 and 6368.1 to provide an exemption for the sale or use of watercraft for use (or for lease for use) in interstate commerce involving the transportation of property or persons for hire. The Board then had a statutory basis for an exercise of its discretion, and it adopted Regulation 1594 to interpret the language in sections 6368 and 6368.1, further explaining that tax will not apply if the principal use of the watercraft is transportation for hire in interstate commerce during a specified time after its first use.

The Legislature has also adopted an exemption from sales and use taxes in Revenue and Taxation Code section 6368.5, which has been incorporated in subdivision (c) of Regulation 1620, for the use of rail freight cars in interstate commerce. In the case of both watercraft and rail freight cars, in order for the Board to adopt the regulatory language exempting the interstate commerce use of watercraft and rail freight cars, there had to be existing statutory language to interpret. The existence of the use tax imposition statute, section 6201, was not a valid basis for exempting the sale or use of watercraft or rail freight cars used in interstate commerce, nor is this section a valid basis for providing the exemption sought by the association for buses purchased for use in California and then used primarily in interstate commerce.

### Attorney General Opinion

Consultation with the Attorney General would give an objective opinion as to the existence of, and necessity for, statutory authority in support of the association's proposal.

### Regulation Revision

The association and the CTA feel that the regulation revision process would be much less burdensome than the adoption of statutory authority, would result in a more rapid implementation, and would result in the clarity and standardized application of the tax that is needed.

If the Board chooses not to request an opinion from the Attorney General and decides that statutory authority is not required, staff recommends that any regulatory change be made to subdivision (b)(2)(B) of the regulation interpreting the constitutional exemption for use in interstate commerce rather than adopting the association's proposed amendment to subdivision (b)(3) which interprets the basic use tax imposition statute regarding property purchased for use or used in California. (See Exhibit 10 for the regulatory language drafted by staff.)

The association asserts that subdivision (b)(3) of Regulation 1620 is an example of how the Board has exercised its quasi-legislative authority to create a "bright line" test to clarify when property is considered to have been purchased for use in this state. We agree. The 90-day and six-month tests are practical tests designed to determine *the physical location* where the taxpayer intended to use the property. Staff agrees with the association's assertion that subdivision (b)(3) is an example of the Board's exercise of its quasi-legislative authority to create a "bright line" test clarifying when property is considered to have been purchased for use in this state. However, contrary to the association's assertion, these tests do, in fact, have a specific statutory basis. Quite simply, they are tests adopted to determine when a purchaser will be regarded as having intended to purchase the property for use in California. Furthermore, the 90-day test has an additional statutory basis with respect to vehicles brought into California within 90 days of purchase. (Rev. & Tax. Code § 6248.)

The tests in subdivision (b)(3) relate to the *physical location* of use. As discussed above, if the property is regarded as purchased for use in California under these tests, the use of the property in California may still qualify for exemption. The test in subdivision (b)(2)(B) relates to the *character* of the use of the property, as required by the Commerce Clause of the United States Constitution, which provides the basis for the exemption. The exemption will apply under the regulation if the property is first functionally used outside this state prior to its entry into California and then is used *continuously* in interstate commerce for the next six consecutive months, both within and without California, without any use that is exclusively intrastate in nature. When this test was adopted, it was based on the specific statutory authority of section 6352 and the Board's understanding of applicable United States Supreme Court opinions.

The association proposes adding the following regulatory language to subdivision (b)(3) of Regulation 1620:

*“Buses purchased outside of California which are brought into California are regarded as having been purchased for use in this state if the first functional use of the bus is in California. When the bus is first functionally used outside of California, the bus will nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless one-half or more of the miles traveled by the bus during the six month period immediately following its entry into this state are miles traveled in interstate commerce. Such use will be accepted as proof of an intent that the property was not purchased for use in California. Examples of what constitutes interstate commerce include...”*

The test for whether property is purchased for use in California and the test for whether the Commerce Clause of the United States Constitution prohibits taxation clearly are separate tests, based upon separate statutory authority. They must be kept separate. Subdivision (b)(3) is strictly the determination of whether or not property was purchased for use in California. Whether the *character* of that use in California will be in interstate commerce has nothing to do with the fact of whether that use will occur in this state. Subdivision (b)(2)(B), on the other hand, deals solely with the determination of whether the use of property is exempt based upon interstate commerce use. We *only* reach this issue if it has already been determined that the property was purchased for use in California. Furthermore, *there is no statutory basis for distinguishing the use of buses from the use of other property, whether that other property is trucks or is computers, when it comes to the determination of whether the property was purchased for use in California.*

Staff strongly believes that if *any* changes are made to Regulation 1620 as proposed by the association to exempt the use of buses used primarily in interstate commerce, the changes should be made to the subdivision of Regulation 1620 related to the interstate commerce exemption, which is subdivision (b)(2)(B), and that *no* changes should be made to subdivision (b)(3).

If the Board decides to amend Regulation 1620, the following comments are relevant:

1. In its July 2, 1999 letter, the association defines primary interstate commerce use as one-half or more of the miles traveled by the bus during the six-month period immediately following its entry into this state as miles traveled in interstate commerce.

Staff is of the opinion that primary use should mean more than 50 percent, as illustrated in regulatory language drafted by staff (Exhibit 10). Staff’s view is that primary use is a use greater than equal use.

2. Although for consistency with other regulatory language staff believes that time should be the primary measure for interstate commerce use, staff does not object to the association’s proposal that mileage be used as a substitute measure.
3. Staff and the association agree to including clarifying examples. The association’s July 2, 1999 proposal includes examples of what activities would constitute interstate commerce use. Staff’s draft includes examples of what activities would constitute interstate *and intrastate* commerce use.

4. As part of its original proposal for revision to the regulation, the association proposed that the commencement date for the six-month interstate commerce test be either the date of entry into this state or the date of purchase. Staff believes that the date of purchase of a bus outside California is not a proper commencement date because the state's jurisdiction does not attach until entry of the bus into this state. Accordingly, staff agrees with the association's current proposal that the commencement date be the date of entry into California.

## **V. Staff Recommendation**

### **A. Description of Staff's Recommendation**

Support new legislation to provide a statutory exemption for certain vehicles (trucks, truck tractors, semitrailers or trailers, any of which has an unladen weight of 6,000 or more, buses and auxiliary dollies) used in interstate commerce. This legislation would be similar to current statutory exemptions provided for aircraft used in common carrier activities (Rev. & Tax. Code § 6366), watercraft used in interstate commerce or common carrier activity (Rev. & Tax. Code §§6368 and 6368.1), and rail freight cars (Rev. & Tax. Code §6368.5).

### **B. Pros of the Staff Recommendation**

- Provides the necessary authority to exempt from tax the type of vehicles at issue that are used in interstate commerce activities.
- Limits the exemption to buses and defined trucks used in interstate commerce.
- Provides both a sales tax and a use tax exemption for the use of these vehicles in interstate commerce.
- Provides consistency with existing statutory exemptions for the use of other specified property in interstate commerce.
- Results in a tax benefit for taxpayers engaged in interstate commerce activities.
- Encourages bus and truck manufacturing operations and sales activity to return to California

### **C. Cons of the Staff Recommendation**

- Requires the Legislature to adopt the proposal, followed by an amendment to the regulation based on the new legislation.
- Does not provide the more rapid change to Regulation 1620 being requested by the association.
- Lacks consistency with the U.S. Supreme Court interpretation of the Commerce Clause of the U.S. Constitution.

#### **D. Statutory or Regulatory Change**

This recommendation would require new statutory authority prior to regulatory changes to Regulations 1620 and 1661.

#### **E. Administrative Impact**

Affected taxpayers, industry associations, and staff would need to be notified.

#### **F. Fiscal Impact**

##### **1. Cost Impact**

Cost would be minimal and absorbable.

##### **2. Revenue Impact**

See Exhibit 1 for the revenue estimate for this recommendation.

#### **G. Taxpayer/Customer Impact**

Depending upon the statutory requirements for exemption, taxpayer recordkeeping would be required; however, it would not appear to exceed current recordkeeping requirements and may well require less recordkeeping.

#### **H. Critical Time Frames**

None

### **VI. Alternative 1**

#### **A. Description of Alternative 1**

Request an opinion from the Attorney General to identify the existence of, and necessity for, statutory authority for exempting the use of buses in interstate commerce from California use tax.

#### **B. Pros of Alternative 1**

This recommendation would provide an objective opinion as to whether or not statutory authority is necessary to make the proposed amendments, as well as an opinion as to the existence of statutory authority.

**C. Cons of Alternative 1**

Does not provide the immediate change to Regulation 1620 being requested by the association.

**D. Statutory or Regulatory Change**

None

**E. Administrative Impact**

None

**F. Fiscal Impact**

1. Cost Impact

Cost would be minimal and absorbable.

2. Revenue Impact

None

**G. Taxpayer/Customer Impact**

None

**H. Critical Time Frames**

None

**VII. Alternative 2**

**A. Description of Alternative 2**

Amend Regulation 1620(b)(3), as recommended by the association, to state that a bus purchased and first functionally used outside of this state and brought into California within 90 days after its purchase is presumed to have been purchased for use in this state unless one-half or more of the miles traveled by the bus during the six month period immediately following its entry into this state are miles traveled in interstate commerce; and include examples in subdivision (b)(3) to clarify what type of movement constitutes an interstate commerce movement.

**B. Pros of Alternative 2**

- Provides the association's requested exemptions from use tax.

- Results in a potential tax benefit for taxpayers engaged in interstate commerce activities.
- The addition of examples clarifies what constitutes interstate commerce use.
- Less burdensome than the adoption of statutory authority.

### **C. Cons of Alternative 2**

- Lacks consistency with court decisions regarding the quasi-legislative authority that has been granted to the Board, in that the Legislature has given the Board the authority to prescribe and adopt rules and regulations, so long as this authority is executed within the scope of a controlling statute. Currently, staff believes there is no controlling statute relevant to the association's proposal.
- Lacks consistency with the U.S. Supreme Court interpretation of the Commerce Clause of the U.S. Constitution.
- This proposal would not provide an exemption from sales tax.
- This proposal only applies to the use of buses in interstate commerce and not related modes of transportation.
- This proposal would continue to give out-of-state manufacturers and retailers an economic advantage over California retailers of these types of vehicles.
- This proposal does not provide examples of intrastate commerce activity.

### **D. Statutory or Regulatory Change**

This alternative proposal would require a revision to Regulation 1620.

### **E. Administrative Impact**

Affected taxpayers, industry associations, and staff would need to be notified.

### **F. Fiscal Impact**

#### **1. Cost Impact**

Cost would be minimal and absorbable.

#### **2. Revenue Impact**

Currently, the majority of the purchases of these types of vehicles are from out-of-state vendors; therefore, the revenue impact would be similar in nature to that for the staff recommendation. See Exhibit 1 for the revenue estimate.



### **G. Taxpayer/Customer Impact**

Taxpayer recordkeeping would be required; however, it would not appear to exceed current recordkeeping requirements and may well require less recordkeeping.

### **H. Critical Time Frames**

None

## **VIII. Alternative 3**

### **A. Description of Alternative 3**

Amend Regulation 1620(b)(2)(B), as drafted by staff, to state that use tax does not apply to the use of property purchased for use and used in interstate commerce prior to its entry into this state, and thereafter used primarily in interstate commerce both within and without California and not exclusively in California; and include examples in subdivision (b)(2)(B) to clarify what types of movements constitute interstate and intrastate commerce activities.

### **B. Pros of Alternative 3**

- Provides the association's requested exemptions from use tax.
- Results in a potential tax benefit for taxpayers engaged in interstate commerce activities.
- The addition of examples clarifies what constitutes interstate *and intrastate* commerce use.
- Less burdensome than the adoption of statutory authority.

### **C. Cons of Alternative 3**

- Lacks consistency with court decisions regarding the quasi-legislative authority that has been granted to the Board, in that the Legislature has given the Board the authority to prescribe and adopt rules and regulations, so long as this authority is executed within the scope of a controlling statute. Currently, staff believes there is no controlling statute relevant to this alternative.
- Lacks consistency with the U.S. Supreme Court interpretation of the Commerce Clause of the U.S. Constitution.
- Does not change Regulation 1620 in the manner currently proposed by the association.
- This alternative would not provide an exemption from sales tax.
- This alternative would continue to give out-of-state manufacturers and retailers an economic advantage over California retailers of these types of vehicles.

#### **D. Statutory or Regulatory Change**

This alternative would require a revision to Regulations 1620 and 1661.

#### **E. Administrative Impact**

Affected taxpayers, industry associations, and staff would need to be notified.

#### **F. Fiscal Impact**

##### **1. Cost Impact**

Cost would be minimal and absorbable.

##### **2. Revenue Impact**

The revenue impact of this alternative is uncertain. See Exhibit 1 for the revenue estimate.

#### **G. Taxpayer/Customer Impact**

Taxpayer recordkeeping would be required; however, it would not appear to exceed current recordkeeping requirements and may well require less recordkeeping.

#### **H. Critical Time Frames**

None

Prepared by: Program Planning Division, Sales and Use Tax Department

Current as of: July 15, 1999 1:23 PM



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## REGULATION 1620 - INTERSTATE AND FOREIGN COMMERCE

### Staff Recommendation

Staff recommends that specific legislation be proposed to provide a statutory exemption for buses and certain other vehicles used in interstate or foreign commerce.

### Background, Methodology, and Assumptions

The proposed legislation would exempt from the sales and use tax buses and certain other vehicles (trucks, truck tractors, semitrailers or trailers, any of which has an unladen weight of 6,000 pounds or more, and auxiliary dollies) used in interstate or foreign commerce.

According to the Department of Motor Vehicles (DMV), there are currently 38,311 trucks and truck tractors involved in interstate commerce operating in California. Of these, 8,173 are registered in California; the others have their principal registrations in other states. Of these 8,173 trucks and truck tractors, 1,583 are new trucks and truck tractors registered in California in the past year. These trucks and truck tractors cost about \$100,000 each and the California sales and use tax would be \$7,920 per truck.

There are currently 12,315 trailer coaches (buses) involved in interstate commerce operating in California. Of these, 2,623 are registered in California; the others have their principal registrations in other states. Of these 2,623 trailer coaches, 393 are new trailer coaches registered in California in the past year. These trailer coaches cost about \$250,000 each and the California sales and use tax would be \$19,800 per trailer coach.

Also there are currently 244,541 semitrailers, trailers, and auxiliary dollies involved in interstate commerce operating in California. Of these, 17,946 are registered in California; the others have their principal registrations in other states. Of these 17,946 vehicles, 2,262 are new vehicles registered in California in the past year. These vehicles cost about \$10,000 each and the California sales and use tax would be \$792 per vehicle.

The total sales of these vehicles would be as follows:

<u>Type of Vehicle</u>	<u>Yearly New Registrations</u>	<u>Average Cost</u>	<u>Total Cost</u>	<u>50 Percent of Total Cost</u>
Trucks, truck tractors	1,583	\$100,000	\$158.3 million	\$ 79.15 million
Trailer Coaches (Buses)	393	250,000	98.3 million	49.15 million
Semitrailers, trailers auxiliary dollies	2,262	10,000	22.6 million	11.30 million
Total	4,238		\$279.2 million	\$139.60 million

The proposed legislation would exempt the sale or use of these vehicles from the sales and use tax. However, some of these vehicles are already exempt from the sales and use tax per Regulation 1620. We have no way of knowing how many of these vehicles already qualify for the use tax exemption granted by Regulation 1620. Although no testing was performed due to time constraints, the audit experience of the Sales and Use Tax Department indicates that perhaps half of these vehicles are currently exempt from the sales and use tax.

## Revenue Estimate

Staff Recommendation. Perhaps as much as half of the property newly registered in California for use in interstate and foreign commerce, valued at \$139.6 million, could qualify for the proposed sales and use tax exemption. The revenue impact from exempting this \$139.6 million from the sales and use tax would be as follows:

	<u>Revenue Effect</u>
State loss (5%)	\$ 7.0 million
Local loss (2.25%)	3.1 million
Transit loss (0.67%)	0.9 million
Total	\$ 11.0 million

Alternative 2. This alternative pertains to only buses. Most of the purchases of buses covered in the staff recommendation would be covered by this alternative. The portion of the revenue effect of the staff recommendation attributable to buses (assuming covered purchases of \$49.15 million) is as follows:

	<u>Revenue Effect</u>
State loss (5%)	\$ 2.5 million
Local loss (2.25%)	1.1 million
Transit loss (0.67%)	0.3 million
Total	\$ 3.9 million

Alternative 3. This alternative covers most of the purchases covered by the staff recommendation. It also covers property other than the buses and certain other vehicles covered by the staff recommendation, if that property is used in interstate commerce. Consequently, vehicles of all types (e.g. automobiles) and equipment (e.g. computers or global positioning systems) that is not a component part of a vehicle, could be covered by this alternative. Time constraints precluded inclusion of an investigation of this possible additional coverage in this estimate. Consequently, we are not in a position at this time to say whether the additional coverage would likely cause a sizable increased revenue effect. The revenue impact of this alternative is estimated to be at least as much as the \$11.0 million impact of the staff recommendation.

## Qualifying Remarks

The above estimate is understated to the extent that there are some vehicles which are not included in the DMV's numbers and could qualify for this exemption. The DMV numbers are those vehicles included in the International Registration Plan (IRP). Under this plan, commercial vehicles are registered in one jurisdiction (state or Canadian province) and remit to that jurisdiction all annual fees based on miles traveled the previous year throughout the country. These are vehicles that are engaged in interstate commerce. The vehicles identified in the above estimate are those that report to California and have California apportioned plates. There are some firms engaged in interstate commerce that operate only in border states and pay full California registration fees, not apportioned fees, and could qualify for this exemption.

## **Preparation**

This revenue estimate was prepared by David E. Hayes and Jeff Reynolds, Statistics Section, Agency Planning and Research Division. This revenue estimate was reviewed by Ms. Laurie Frost, Chief, Agency Planning and Research Division and Ms. Freda Orendt-Evans, Program Planning Manager, Sales and Use Tax Department. For additional information, please contact Mr. Hayes or Mr. Reynolds at (916) 445-0840.

Current as of July 15, 1999

**Regulation 1620, Interstate and Foreign Commerce**  
**Analysis of Industry's and Staff's Proposed Language**

Action Item	Industry's Proposed Regulatory Language	Regulatory Language Drafted by Staff	Summary Comments
<b>Action 2 Regulatory Amendment</b>	<p>(b) Use Tax.</p> <p>(1) In General. Use tax applies with respect to any property purchased for storage, use or other consumption and stored, used, or consumed in this state, the sale of which is exempt from sales tax under this regulation.</p> <p>(2) Exceptions.</p> <p>(A) Use tax does not apply to property held or stored in this state for sale in the regular course of business nor to property held for the purposes designated in subparagraph (b)(5), below.</p> <p>(B) Use tax does not apply to property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce both within and without California and not exclusively in California.</p>	<p>(b) Use Tax.</p> <p>(1) In General. Use tax applies with respect to any property purchased for storage, use or other consumption and stored, used, or consumed in this state, the sale of which is exempt from sales tax under this regulation.</p> <p>(2) Exceptions.</p> <p>(A) Use tax does not apply to property held or stored in this state for sale in the regular course of business nor to property held for the purposes designated in subparagraph (b)(5), below.</p> <p>(B) Use tax does not apply to <u>the use of</u> property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used <del>continuously</del> <u>primarily</u> in interstate or foreign commerce both within and without California and not exclusively in California. <u>The use of property, including a vehicle, that is purchased for use in California under subdivision (b)(3) of this regulation, is nevertheless exempt from tax if the property is purchased for use, and used, in interstate or foreign commerce prior to its entry into this</u></p>	<p>No change to existing regulatory language.</p> <p>No change to existing regulatory language.</p> <p>Staff believes that there is no statutory basis, and thus no basis for the exercise of discretion by the Board, to adopt the regulatory amendments proposed by the association as well as the regulatory amendments drafted by staff.</p> <p>If the Board concludes that statutory authority is not necessary to make an amendment to Regulation 1620, staff recommends that any change be made to subdivision</p>

**Regulation 1620, Interstate and Foreign Commerce**  
**Analysis of Industry's and Staff's Proposed Language**

Action Item	Industry's Proposed Regulatory Language	Regulatory Language Drafted by Staff	Summary Comments
		<p><u>state, and is thereafter used primarily in interstate or foreign commerce both within and without California.</u></p> <p><u>Property is "used primarily in interstate or foreign commerce" if, during the six-month period immediately following its first entry into California, it is used in interstate or foreign commerce more than one-half the time that it is used. A vehicle will also be regarded as "used primarily in interstate or foreign commerce" if, during the six-month period immediately following its first entry into California, more than one-half of the miles traveled by the vehicle during that six-month period are miles traveled in interstate or foreign commerce.</u></p> <p><u>For the use of property to qualify for the exemption, it must satisfy all the elements of the exemption, one of which is whether the use is in interstate or foreign commerce. Examples of what constitutes use in interstate or foreign commerce for purposes of that portion of the test include, but are not limited to, the following:</u></p> <p><u>1. A bus or truck is dispatched empty from another state or country to California,</u></p>	<p>1620(b)(2)(B) of the regulation, rather than subdivision 1620(b)(3), as proposed by the association.</p> <p>Subdivision 1620(b)(2)(B) interprets the constitutional exemption for use in interstate commerce, whereas subdivision 1620(b)(3) interprets the basic use tax imposition statute regarding property purchased for use or used in California.</p> <p>Subdivision (b)(3) is strictly the determination of whether or not property was purchased for use in California. Subdivision (b)(2)(B) deals solely with the determination of whether the use of property is exempt based upon interstate commerce use. We only reach this issue if it has already been determined that the property was purchased for use in California.</p> <p>The test in subdivision (b)(2)(B) relates to the <i>character</i> of the</p>



**Regulation 1620, Interstate and Foreign Commerce**  
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		<p><u>or from California to another state or country, to pick up a specific payload, and the payload then is transported to its destination, which may be within the borders of that state or country. (Example: Truck dispatched empty from Sacramento, CA to Reno, NV to transport specific cargo from Reno, NV to Elko, NV.)</u></p> <p><u>2. A truck or bus transports cargo or passengers between California and another state or country, or between two places within California travelling through another state or country. (Example: Bus carries passengers between Reno, NV and Sacramento, CA or from Truckee, CA to Bishop, CA travelling through Nevada.)</u></p> <p><u>3. A carrier operating wholly within California has regularly scheduled service picking up or feeding passengers arriving from or destined to another state or country to another form of transportation, be it plane, train, ship, or bus. (Example: Passengers, upon arriving at a California airport on an out-of-state flight, use an airport bus service or a bridge carrier for Amtrak to go to a bus or Amtrak station to then travel by bus or train to their destination in California.)</u></p> <p><u>4. A truck picks up cargo from a carrier that brought the cargo into California from</u></p>	<p>use of the property. The tests in subdivision (b)(3) relate to the <i>physical location</i> of use. Whether the <i>character</i> of that use in California will be in interstate commerce has nothing to do with the fact of whether that use will occur in this state.</p> <p>Staff believe that the test for whether property is purchased for use in California and the test for whether the Commerce Clause of the United States Constitution prohibits taxation clearly are separate tests, based upon separate statutory authority. They must be kept separate.</p> <p>Staff strongly believe that if <i>any</i> changes are made to Regulation 1620 to exempt the use of buses used primarily in interstate commerce, the changes should be made to the subdivision of Regulation 1620 related to the interstate commerce exemption, which is subdivision (b)(2)(B),</p>

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		<p><u>another state or country, and transports the cargo solely within California to its destination in California.</u></p> <p>Examples of what do not constitute use in interstate or foreign commerce include, but are not limited to, the following:</p> <ol style="list-style-type: none"> <li>1. <u>A bus or truck which has not been dispatched to pick up any specific payload and which carries no passengers or cargo travels from another state or country to California, or travels from California to another state or country. (Example: Bus deadheads back into California after taking tour group from California to another state where tour ended.)</u></li> <li>2. <u>A bus or truck is used to replace another bus or truck that had entered California carrying passengers or cargo from another state or country, where the replacement was necessary because of mechanical problems of the vehicle that had entered California, and the replacement bus or truck transports passengers or cargo within California, never leaving the state.</u></li> <li>3. <u>A truck transports cargo, which had been shipped by another carrier to a California warehouse from another state or</u></li> </ol>	<p>and that <i>no</i> changes should be made to subdivision (b)(3).</p> <p>For consistency with other regulatory language, staff believe that time should be the primary measure for interstate commerce use, however the regulatory language drafted by staff allows for measurement by both time and mileage. The language proposed by the Association only allows measurement by mileage.</p> <p>Staff and the Association agree to include clarifying examples. The regulatory language drafted by staff includes examples of what activities would constitute interstate and intrastate commerce use. The Association's proposal only includes examples of activities that would constitute interstate commerce use.</p>

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	<p>(C) Use tax, however, does not apply to certain new motor vehicles purchased for subsequent delivery to a foreign country and so delivered pursuant to paragraph (b)(2)(D) of Regulation 1610 (18 CCR 1610).</p> <p>(3) Purchase for Use in this State. Property delivered outside of California to a purchaser known by the retailer to be a resident of California is regarded as having been purchased for use in this state unless a statement in writing, signed by the purchaser or the purchaser's authorized representative, that the property was purchased for use at a designated point or points outside this state is retained by the vendor.</p> <p>Notwithstanding the filing of such a statement, property purchased outside of California which is brought into California is</p>	<p><u>country, from the warehouse to another place within California, never leaving the state.</u></p> <p><u>4. A tour bus travels entirely within California carrying a tour group that contracted for the tour in another state or country and that traveled to California via plane, train, or ship from another state or country.</u></p> <p>(C) Use tax, however, does not apply to certain new motor vehicles purchased for subsequent delivery to a foreign country and so delivered pursuant to paragraph (b)(2)(D) of Regulation 1610 (18 CCR 1610).</p> <p>(3) Purchase for Use in this State. Property delivered outside of California to a purchaser known by the retailer to be a resident of California is regarded as having been purchased for use in this state unless a statement in writing, signed by the purchaser or the purchaser's authorized representative, that the property was purchased for use at a designated point or points outside this state is retained by the vendor.</p> <p>Notwithstanding the filing of such a statement, property purchased outside of California which is brought into California is</p>	<p>No change to existing regulatory language.</p>

**Regulation 1620, Interstate and Foreign Commerce**  
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	<p>regarded as having been purchased for use in this state if the first functional use of the property is in California. When the property is first functionally used outside of California, the property will nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless the property is used or stored outside of California one-half or more of the time during the six-month period immediately following its entry into this state. Prior out-of-state use not exceeding 90 days from the date of purchase to the date of entry into California is of a temporary nature and is not proof of an intent that the property was purchased for use elsewhere. Prior out-of-state use in excess of 90 days from the date of purchase to the date of entry into California, exclusive of any time of shipment to California, or time of storage for shipment to California, will be accepted as proof of an intent that the property was not purchased for use in California. <u>Buses purchased outside of California which are brought into California are regarded as having been purchased for use in this state if the first functional use of the bus is in California. When the bus is first functionally used outside of California, the bus will nevertheless be presumed to have</u></p>	<p>regarded as having been purchased for use in this state if the first functional use of the property is in California. When the property is first functionally used outside of California, the property will nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless the property is used or stored outside of California one-half or more of the time during the six-month period immediately following its entry into this state. Prior out-of-state use not exceeding 90 days from the date of purchase to the date of entry into California is of a temporary nature and is not proof of an intent that the property was purchased for use elsewhere. Prior out-of-state use in excess of 90 days from the date of purchase to the date of entry into California, exclusive of any time of shipment to California, or time of storage for shipment to California, will be accepted as proof of an intent that the property was not purchased for use in California.</p>	<p>The association states that the purpose of its proposed amendment is to further interpret and make specific what constitutes a purchase for use in this state; therefore, they are proposing an amendment to subdivision 1620(b)(3) – Purchase for Use in this State.</p> <p>The association believes that its proposed amendment is within the quasi-legislative authority of the Board to implement, interpret or make specific provisions of the Sales and Use Tax Law.</p> <p>As summarized for comments relating to subdivision 1620(b)(2)(B), staff's view is that the test for whether property is purchased for use in California and the test for</p>

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	<p><u>been purchased for use in this state if it is brought into California within 90 days after its purchase, unless one-half or more of the miles traveled by the bus during the six month period immediately following its entry into this state are miles traveled in interstate commerce.<sup>1</sup> Such use will be accepted as proof of an intent that the property was not purchased for use in California. Examples of what constitutes interstate commerce include, but are not limited to the following:</u></p> <p style="padding-left: 40px;"><u>1. A sightseeing tour bus group (charter) or regularly scheduled bus service (per capita) originates in California and travels to another state or country for a single day or several days then returns to California where the charter or schedule terminates.</u></p> <p style="padding-left: 40px;"><u>2. A charter bus deadheads under contract to another state, picks up the group and operates the charter without entering the state of California, drops the group in the other state, and deadheads back into the state of California. (Charter was quoted round trip.)</u></p>		<p>whether the Commerce Clause of the United States Constitution prohibits taxation clearly are separate tests, based upon separate statutory authority. They must be kept separate.</p> <p>Furthermore, staff believes that <i>there is no statutory basis for distinguishing the use of buses from the use of other property, whether that other property is trucks or is computers, when it comes to the determination of whether the property was purchased for use in California.</i> Therefore, the regulatory language drafted by staff applies to all property, rather than limited to buses, as proposed by the Association.</p> <p>Also, staff is of the opinion that primary use means more than 50 percent, as illustrated in regulatory language drafted by</p>

<sup>1</sup> The CTA suggests that "time in use" and "lease contract revenues" be added as alternative means to calculate the degree of use in interstate or foreign commerce, but did not provide details demonstrating how these calculations would be made.

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	<p><u>3. A charter bus group tours under contract to another state or country for a day or several days then drops the passengers in the other state or country and then dead heads back under contract to its terminal or next assignment.</u></p> <p><u>4. A sightseeing tour bus group (charter) arrives in California via plane, train, or ship is picked up by bus and tours California for a number of days and then goes to another state or country for a number of days and then terminates service either in another state, country or California.</u></p> <p><u>5. A sightseeing tour bus group (charter) or regularly scheduled bus service enters California in bus #1, and bus #1 has a road failure which causes bus #2 to continue the trip while bus #1 is being mechanically repaired. Bus #2 would be in interstate commerce as a continuation intent of the character of the original trip.</u></p> <p><u>6. Regularly scheduled services where a carrier operating wholly within California is picking up or feeding passengers arriving from or destined to a state or country other than California to another form of transportation be it plane, train, ship, or bus.</u></p>		<p>staff. The Association is of the opinion that primary use, as illustrated in their proposed language in subdivision (b)(3) is one half or more. Staff's view is that primary use is a use greater than equal use.</p>

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	<p><u>(Example: an airport bus service or a bridge carrier for Amtrak.)</u></p> <p>For purposes of this subparagraph "functional use" means use for the purposes for which the property was designed.</p> <p>(4) Imports. Use tax applies with respect to purchases of property imported into this state from another country when the use occurs after the process of importation has ceased and when sales tax is not applicable, regardless of whether the property is in its original package.</p> <p>(5) "Storage" and "Use" - Exclusions. "Storage" and "use" do not include the keeping, retaining or exercising any right or power over property for the purposes of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated or manufactured, into, attached to, or incorporated into, other property to be transported outside the state and thereafter used solely outside the state.</p> <p>The following examples are illustrative of the meaning of the exclusion:</p>	<p>For purposes of this subparagraph "functional use" means use for the purposes for which the property was designed.</p> <p>(4) Imports. Use tax applies with respect to purchases of property imported into this state from another country when the use occurs after the process of importation has ceased and when sales tax is not applicable, regardless of whether the property is in its original package.</p> <p>(5) "Storage" and "Use" - Exclusions. "Storage" and "use" do not include the keeping, retaining or exercising any right or power over property for the purposes of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated or manufactured, into, attached to, or incorporated into, other property to be transported outside the state and thereafter used solely outside the state.</p> <p>The following examples are illustrative of the meaning of the exclusion:</p>	<p>No change to existing regulatory language.</p> <p>No change to existing regulatory language.</p> <p>No change to existing regulatory language.</p> <p>No change to existing regulatory language.</p>

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	<p>1. An engine installed in an aircraft which is flown directly out of the state for use thereafter solely outside the state qualifies for the exclusion. The use of the engine in the transporting process does not constitute a use for purposes of the exclusion. However, if any other use is made of the aircraft during removal from this state, such as carrying passengers or property, the exclusion does not apply.</p> <p>2. An engine installed in a truck which is transported by rail or air directly out of the state for use thereafter solely outside the state qualifies for the exclusion.</p> <p>3. An engine transported outside the state and installed on an aircraft which returns to the state does not qualify for the exclusion. It does not matter whether the use of the aircraft in California is exclusively interstate or intrastate commerce or both.</p> <p>4. An engine transported outside the state and installed on an aircraft which does not return to the state, qualifies for the exclusion.</p>	<p>1. An engine installed in an aircraft which is flown directly out of the state for use thereafter solely outside the state qualifies for the exclusion. The use of the engine in the transporting process does not constitute a use for purposes of the exclusion. However, if any other use is made of the aircraft during removal from this state, such as carrying passengers or property, the exclusion does not apply.</p> <p>2. An engine installed in a truck which is transported by rail or air directly out of the state for use thereafter solely outside the state qualifies for the exclusion.</p> <p>3. An engine transported outside the state and installed on an aircraft which returns to the state does not qualify for the exclusion. It does not matter whether the use of the aircraft in California is exclusively interstate or intrastate commerce or both.</p> <p>4. An engine transported outside the state and installed on an aircraft which does not return to the state, qualifies for the exclusion.</p>	

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Current as of 09/24/99 8:10 AM.



We have been asked to provide our view as to how tax applies in a number of circumstances involving the use of buses in this state – based upon the current provisions of Regulation 1620. Regulation 1620(b)(2)(B) presently provides as follows:

“Use tax does not apply to property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce both within and without California and not exclusively in California.”

Transactions otherwise taxable – because property was purchased for use in California and was used in California – have been treated as nontaxable when the *entire* use of the property has been in interstate or foreign commerce. A test of six months after the vehicle enters California has been used.

Our view is that to qualify for nontaxability under the referenced provision of the regulation, property must have a continuing non-broken use in interstate commerce. Even a single use of the property in intrastate commerce during the test period is disqualifying. (*Southern Pacific Co. v. Gallagher* (1939) 306 U.S. 167; 83 L.Ed 586.)

We have rejected the view that there is any principal use test (more than one-half of the time) embedded in the regulation. That is, it is our view that even if property is used more than one-half of the time in interstate use during the test period, and the balance of the time in intrastate use, the property will *not* be regarded as having been used “continuously” in interstate or foreign commerce and *will* be taxable.

Thus, under the regulation as it presently reads, tax is applicable as set forth in the attachment.

**INTERSTATE COMMERCE SCENARIOS**

	<b>Each bus was purchased out of state and entered CA engaged in interstate commerce activity within 90 days of purchase.</b>	<b>Allocation of use to in-state use and out-of-state use for the test period (Purchased for use in CA?)</b>	<b>Under U.S. Constitution</b>	<b>Under Regulation 1620(b)(2)(B)</b>
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<b>1.</b>	Group originates in CA and travels to another state and returns within a 24 hour period.	The portion of each day the bus was used or stored inside CA is compared to the portion of each day the bus was used or stored outside CA accumulated for the six month period.	Taxable	Nontaxable under regulation.
<b>2.</b>	Group originates in CA and tours CA for several days and then leaves the state and charter terminates in a different state.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>3.</b>	Group originates in CA and tours CA for several days and leaves the state and returns to CA where the charter terminates.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>4.</b>	Group originates in California, leaves the state directly, tours other states for several days and returns to CA directly and the charter terminates.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.

**INTERSTATE COMMERCE SCENARIOS**

	<b>Each bus was purchased out of state and entered CA engaged in interstate commerce activity within 90 days of purchase.</b>	<b>Allocation of use to in-state use and out-of-state use for the test period (Purchased for use in CA?)</b>	<b>Under U.S. Constitution</b>	<b>Under Regulation 1620(b)(2)(B)</b>
<b>5a.</b>	Bus deadheads under contract to another state, picks up the group and operates the charter without entering the state of CA, deadheads back into the state of California.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	<p>Taxable under regulation.</p> <p>The deadhead to another state under contract and the tour are interstate commerce activities.</p> <p>The return trip to CA is not an interstate commerce activity.</p>
<b>5b.</b>	Bus deadheads without contract to another state, books a tour group and operates the charter without entering the state of CA, deadheads back to California.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	<p>Taxable under regulation.</p> <p>The deadhead to another state, tour and deadhead return are not interstate commerce activities.</p>
<b>6.</b>	Group arrives in California via plane, train or ship from another state or country and tours CA (not leaving the state) by bus.	All days during the six month test are CA use.	Taxable	Taxable under regulation.
<b>7.</b>	Group arrives in California via plane, train or ship and tours California by bus and leaves the state. The charter then either terminates within or outside the state of CA.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.

**INTERSTATE COMMERCE SCENARIOS**

	<b>Each bus was purchased out of state and entered CA engaged in interstate commerce activity within 90 days of purchase.</b>	<b>Allocation of use to in-state use and out-of-state use for the test period (Purchased for use in CA?)</b>	<b>Under U.S. Constitution</b>	<b>Under Regulation 1620(b)(2)(B)</b>
<b>8.</b>	Regularly schedules service where a carrier operating wholly within CA is picking up or feeding passengers arriving from or destined to a state other than CA to another form of transportation be it plane, train, bus or ship. (Example, an airport bus service or a bridge carrier for Amtrak.)	All days during the six month test are CA use.	Taxable	Nontaxable under regulation.
<b>9.</b>	Regularly scheduled bus service (per capita sales) between California and another state.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>10.</b>	Buses that carry packages express (freight) which has originated in or is destined to a state other than California whether it be wholly within the state or across state lines	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>11.</b>	Scheduled service that operates to or from the Port of Entry at the international border.	All days during the six month test are CA use.	Taxable	Taxable under regulation.

**INTERSTATE COMMERCE SCENARIOS**

	<b>Each bus was purchased out of state and entered CA engaged in interstate commerce activity within 90 days of purchase.</b>	<b>Allocation of use to in-state use and out-of-state use for the test period (Purchased for use in CA?)</b>	<b>Under U.S. Constitution</b>	<b>Under Regulation 1620(b)(2)(B)</b>
<b>12.</b>	Charters that originate in California destined to Mexico either on a one way or round trip basis.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>13a.</b>	Group enters the state by bus #1 and bus #1 is replaced for local sight seeing, or for mechanical reasons, with bus #2..	The total days and partial days bus #1 was used or stored inside CA is compared to the total days and partial days bus #1 was used or stored outside CA.	Taxable	Bus #1 is nontaxable under regulation.
<b>13b.</b>	Group enters the state by bus #1 and bus #1 is replaced for local sight seeing, or for mechanical reasons, with bus #2.	All bus #2 days during the six month test are CA use.	Taxable	Bus #2 is taxable under regulation.
<b>14.</b>	Pick up local senior group in the Los Angeles area and take to Tijuana, Mexico, stopping along the way for rest stop or lunch and returning that evening.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.

**INTERSTATE COMMERCE SCENARIOS**

	<b>Each bus was purchased out of state and entered CA engaged in interstate commerce activity within 90 days of purchase.</b>	<b>Allocation of use to in-state use and out-of-state use for the test period (Purchased for use in CA?)</b>	<b>Under U.S. Constitution</b>	<b>Under Regulation 1620(b)(2)(B)</b>
<b>15.</b>	Pick up local senior group in the Los Angeles area and take to Stateline, Nevada for an eight hour stay and return home that same evening. Make rest stop in Barstow.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>16.</b>	Pick up senior group in Los Angeles for three day trip. One day at Death Valley, CA, one day in Beatty, NV, back to Death Valley and return to Los Angeles on the third day.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>17.</b>	Pick up senior group in Los Angeles for three day tour. Los Angeles to Mammoth Lakes, CA, then to Reno NV, for one night then return to Los Angeles.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>18.</b>	Pick up group in Los Angeles for five day sky trip. Los Angeles to Salt Lake City, UT, three days shuttle service from hotel to sky slopes, back to Los Angeles	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.

**INTERSTATE COMMERCE SCENARIOS**

	<b>Each bus was purchased out of state and entered CA engaged in interstate commerce activity within 90 days of purchase.</b>	<b>Allocation of use to in-state use and out-of-state use for the test period (Purchased for use in CA?)</b>	<b>Under U.S. Constitution</b>	<b>Under Regulation 1620(b)(2)(B)</b>
<b>19.</b>	Pick up group at Los Angeles Airport for 11 day tour of CA, AZ, and NV. Provide local transportation during stay in NV and provide transportation from hotel to airport on the last day.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	Nontaxable under regulation.
<b>20.</b>	Pick up group at Los Angeles Airport for three day tour of Los Angeles. Airport to hotel transfer, provide sightseeing and hotel to airport transfer.	All days during the six month test are CA use.	Taxable	Taxable under regulation.
<b>21.</b>	Group tour originates in Sacramento and terminates in Oregon. Bus deadheads back to Sacramento.	The total days and partial days the bus was used or stored inside CA is compared to the total days and partial days the bus was used or stored outside CA.	Taxable	<p>Taxable under regulation.</p> <p>The trip from Sacramento to Oregon is an interstate commerce activity.</p> <p>The return trip to CA is not an interstate commerce activity.</p>



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April 20, 1999

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CALIFORNIA BOARD OF LEGAL SPECIALIZATION

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**Via Fax & U.S. Mail (916) 322-4530**

Laureen Simpson  
State Board of Equalization  
Program Planning Division  
450 N Street  
Sacramento, CA 95814

Re: Regulation 1620  
Business Taxes Committee Meeting  
California Bus Association

Dear Ms. Simpson:

Pursuant to direction of the Board, enclosed please find the proposed language for Regulation 1620 on behalf of the California Bus Association. Please have the appropriate staff person contact me upon your receipt of the enclosure.

Sincerely,

BEWLEY, LASSLEBEN & MILLER, LLP

JOSEPH A. VINATIERI, ESQ.

JAV/wd

enclosures

cc: Dan Eisentrager, California Bus Association

**REGULATION 1620****INDUSTRY'S PROPOSED CHANGE****(2) EXCEPTIONS**

(B) Use tax does not apply to property (including vehicles) purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used continuously primarily in interstate or foreign commerce both within and without California. “Used primarily in interstate or foreign commerce” means the property is used in interstate or foreign commerce one-half or more of the time during the six-month period immediately following its entry into this state. As applied to vehicles, the mileage accrued by the vehicle during the six-month period shall be utilized to determine whether the vehicle was used one-half or more in interstate or foreign commerce. When a movement is deemed an interstate or foreign commerce movement, all mileage associated with that movement is interstate or foreign commerce mileage.

A vehicle is used in interstate commerce so long as any part of its cargo is interstate in nature, even though part of the cargo on a given trip may be intrastate in nature. A vehicle may be engaged in interstate commerce while operating entirely within the state if any part of its cargo has an origin in one state and a destination in another. A vehicle is regarded as used in intrastate commerce if the origin and final destination of its entire cargo is within California.

The following are examples of interstate commerce use. In each example a bus was purchased and first functionally used outside of California and entered California within 90 days of purchase and thereafter engaged in interstate commerce activity.

1. A sightseeing tour bus group originates in California and travels to another state and returns within a 24 hour period.
2. A sightseeing tour bus group originates in California and tours California for several days and then leaves the state and charter terminates in a different state.
3. A sightseeing tour bus group originates in California and tours California for several days and leaves the state and returns to California where the charter terminates.
4. A sightseeing tour bus group originates in California, leaves the state directly, tours other states for several days and returns to California directly and the charter terminates.
5. A bus deadheads under contract to another state, picks up the sightseeing tour group and operates the charter without entering the state of California, deadheads back into the State of California.

6. A sightseeing tour bus group arrives in California via plane train or ship from another state or country and tours California (not leaving the state) by bus.
7. A sightseeing tour bus group arrives in California via plane, train or ship and tours California by bus and leaves the state. The charter then either terminates within or outside the state of California.
8. Regularly scheduled bus service where a carrier operating wholly within California is picking up or feeding passengers arriving from or destined to a state other than California to another form of transportation be it plane, train, bus or ship. (Example, an airport bus service or a bridge carrier for Amtrak.)
9. Regularly scheduled bus service (per capita sales) between California and another state.
10. Buses that carry packages express (freight) which have originated in or is destined to a state other than California whether it be wholly within the state or across state lines.
11. Scheduled bus service that operates to or from the Port of Entry at the international border.
12. Charter buses that originate in California destined to Mexico either on a one way or round trip basis.
- 13a. A sightseeing tour bus group enters the state by bus #1 and bus #1 is replaced for local sightseeing, or for mechanical reasons, with bus #2.
- 13b. A sightseeing tour bus group enters the state by bus #1 and bus #1 is replaced for local sightseeing, or for mechanical reasons, with bus #2.
14. A charter bus picks up local senior group in the Los Angeles area and takes the group to Tijuana, Mexico, stopping along the way for rest stop or lunch and returning that evening.
15. A charter bus picks up local senior group in the Los Angeles area and takes the group to Stateline, Nevada for an eight hour stay and return home that same evening. A rest stop is made in Barstow.
16. A charter bus picks up a senior group in the Los Angeles area for a three day trip-one day at Death Valley, CA, one day in Beatty, NV, back to Death Valley and return to Los Angeles on the third day.
17. A charter bus picks up a senior group in Los Angeles for three day tour-Los Angeles to Mammoth Lakes, CA then to Reno, NV for one night then returns to Los Angeles.

18. A charter bus picks up a group in the Los Angeles area for a five day sky trip--Los Angeles to Salt Lake City, UT, three days shuttle service from hotel to ski slopes, back to Los Angeles.

19. A charter bus picks up a group at Los Angeles Airport for 11 day tour of California, Arizona and Nevada. Local transportation is provided during stay in Nevada as well as transportation from hotel to airport on the last day.

20. A charter bus picks up group at Los Angeles Airport for a three day tour of Los Angeles-Airport to hotel transfer, provide sightseeing and hotel to airport transfer.

21. A sightseeing tour bus group tour originates in Sacramento and terminates in Oregon. Bus deadheads back to Sacramento.

The following is an example of use which is not interstate commerce use, and any such use occurring during the six month period commencing with first entry into this state will invalidate this exception.

1. A bus deadheads without contract to another state, books a tour group and operates the charter without entering the state of California and deadheads back to California.

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Re: Follow-up to Meeting on Discussion of Amendments to Regulation 1620

Dear Jan:

As a follow-up on our recent meeting, we were asked to provide information regarding two issues:

1. Utilizing the definitions of interstate commerce and intrastate commerce as found in the Public Utilities Code for purposes of regulation of the bus industry by the Public Utilities Commission ("Code"); and
2. Determination of the commencement date for the six months as of the date of delivery of the bus or the date that the bus first enters California.

With regard to number one above, it is our desire to find a bright line, simple definition by reference to the Public Utilities Code that will conform the definition of interstate commerce in the sales and use tax context to the same definition as found in the CPUC regulatory context. We believe quite strongly that the SBE definition must mirror that of the CPUC which is charged with regulating instrumentalities of intrastate commerce. Unfortunately, in doing our review on this matter, there is not one, simple definitional phrase of interstate commerce that can be utilized.

I draw your attention to Public Utilities Code Section 202 (see Attachment A) which defines the jurisdiction of the State to regulate intrastate commerce. You will note that the definition of intrastate commerce takes its clue from the definition of interstate commerce.

At our meeting, there was discussion regarding the concept that if a bus company had to pay fees to the CPUC (meaning that the transportation in question was an intrastate movement), then this same movement should also be intrastate for purposes of the State Board of Equalization. This

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is the bright line that we would like to draw and which makes for ease of administration and convenience for both the bus companies and the Board. The ability of the CPUC to charge these fees (commonly referred to as PUTRA fees) is found in Sections 403 and 404 of the Public Utilities Code. In Section 404, you will note that the fees may only be collected for "intrastate services". Section 424(b) references "Gross intrastate revenue" and applies only when the origin and destination of the transportation is within California and does not include compensation for transportation in interstate commerce (see Attachment B).

As an adjunct to the foregoing, I draw your attention to definitions found in the Code of Federal Regulations governing the Federal Highway Administration, DOT. These definitions are found in Section 390.5 which defines "charter transportation of passengers", "interstate commerce" and "intrastate commerce". I have enclosed a copy for your immediate perusal (see Attachment C). Of particular interest is the concept that bus transportation of a group of persons under a single contract where said contract is specified in advance, is a critical component for regulation by the Federal Highway Administration. You will also note the definition of interstate commerce.

Lastly, Title 49 of the United States Code provides further instruction. This is the Act that followed the abolition of the Interstate Commerce Commission. Section 13501 discusses interstate commerce with exemptions from regulation found in Section 13506 (see Attachment D).

Based upon all of the foregoing, we have the following language which would be appropriate for the regulation:

INTERSTATE service by a bus or van is defined as any transportation of a passenger or property if the origin or destination, or both, of the passenger or property, involves a transportation service agreement that includes movement beyond the geographical limits of the State.

This INTERSTATE classification of the transportation service will apply even if the bus or van remains entirely in California during its service, if the origin or destination, or both, is beyond California.

See 49 USC §§31132(4) and 13501 and California Public Utilities Code §202.

The foregoing is in rough form; however it references the applicable sections for both federal and state purposes. We believe that by reference to these sections, it will be clear that the definition of the word "interstate" is that utilized by the CPUC.

With respect to the second issue, most of the carriers after they take possession will, within a week or so, have the coach enter California on an extended trip. For purposes of the regulation,

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it would be easier for compliance if we started the clock running from the date of delivery of the coach. However, we continue to be open to your thoughts on this issue.

We recognize that the issue of what constitutes "interstate commerce" is a difficult one. However, we continue to strongly believe that the definition utilized must be the one utilized by the CPUC. This would not only bring conformity among California administrative agencies but would also result in less burdensome record keeping requirements for the bus companies.

Upon your review of the foregoing, I ask that you or someone in the Department contact me to discuss this matter further. Thank you for your consideration.

Sincerely,

BEWLEY, LASSLEBEN & MILLER, LLP

JOSEPH A. VINATIERI, ESQ.

JAV/wd

cc: James Speed, Deputy Director, SBE  
Freda Orendt-Evans, Program Planning Manager, SBE  
Steven Kamp, Tax Counsel to Honorable John Chiang  
Joan Armenta Roberts, Professional Tax Counsel to Honorable Dean Andal  
Paul Steinberg, Legal Counsel to Honorable Dean Andal  
Dan Eisentrager, President, California Bus Association

enclosures

**LAWS RELATING TO PUBLIC UTILITIES**

**DIVISION 1. REGULATION OF PUBLIC UTILITIES**

(Division 1 enacted by Stats. 1951, Ch. 764.)

**PART 1. PUBLIC UTILITIES ACT**

(Part 1 enacted by Stats. 1951, Ch. 764.)

**CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS**

(Chapter 1 enacted by Stats. 1951, Ch. 764.)

201. This part may be cited as the “Public Utilities Act.”

(Enacted by Stats. 1951, Ch. 764.)

202. Neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States; but with reference to passenger stage corporations operating in interstate commerce between any point within this State and any point in any other state or in any foreign nation, the commission may prescribe such reasonable, uniform and nondiscriminatory rules in the interest and aid of public health, security, convenience, and general welfare as, in its opinion, are required by public convenience and necessity.

(Amended by Stats. 1963, Ch. 2148.)

203. Unless the context otherwise requires, the definitions and general provisions set forth in this chapter govern the construction of this part.

(Enacted by Stats. 1951, Ch. 764.)

204. “Corporation” includes a corporation, a company, an association, and a joint stock association.

(Enacted by Stats. 1951, Ch. 764.)

205. “Person” includes an individual, a firm, and a copartnership.

(Enacted by Stats. 1951, Ch. 764.)

206. As used in this chapter “person” and “corporation” include the lessees, trustees, receivers or trustees appointed by any court whatsoever, of the person or corporation.

(Enacted by Stats. 1951, Ch. 764.)

207. “Public or any portion thereof” means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered.

(Enacted by Stats. 1951, Ch. 764.)

208. “Transportation of persons” includes every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage.

(Enacted by Stats. 1951, Ch. 764.)



**LAWS RELATING TO PUBLIC UTILITIES**

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**CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS**

(Chapter 1 enacted by Stats. 1951, Ch. 764.)

## PUBLIC UTILITIES CODE

make payment of the fee to the commission on an annual basis on or before January 15.

(b) Every other carrier and related business not subject to subdivision (a) shall make payment of the fee on a quarterly basis between the first and 15th days of July, October, January, and April.

(c) Each carrier and related business subject to subdivision (b) shall, at that time, prepare and transmit a report, in the form the commission may specify, showing the gross operating revenue of the carrier or related business for the calendar quarter covered by the report together with the fee established pursuant to Section 421. In the case of a railroad corporation, the report shall address the factors identified by the commission as the basis for allocation pursuant to subdivision (g) of Section 422.

(d) Any carrier or related business required to submit information and reports under this article may, in lieu thereof, submit copies of information or reports made to another governmental agency if all of the following requirements are met:

(1) The alternate information or reports contain all of the information required by the commission.

(2) The requirements to which the alternate information or reports are responsive are clearly identified.

(3) The information or reports are certified by the carrier or related business to be true and correct.

(Amended by Stats. 1991, Ch. 767, Sec. 4.)

424. As used in this article:

(a) "Class" means a group of carriers or related businesses as specified by the commission for purposes of establishing the fees pursuant to this article. The commission shall create separate classes for the following: passenger vehicle operators, pipeline corporations, vessel operators, railroad corporations, and commercial air operators.

(b) "Gross intrastate revenue" includes all compensation for the transportation or storage of property or the transportation of persons when both the origin and destination of the transportation or the performance of the service is within this state, and shall not include compensation for the transportation of persons or property in interstate or foreign commerce or the transportation of vehicles by ferries. "Gross intrastate revenue," as determined pursuant to this article, shall apply only for purposes of determining the fees required by this chapter and shall not necessarily constitute gross operating revenue for any other purpose.

(c) "Fee" means that monetary amount determined in accordance with this article.

(Amended by Stats. 1991, Ch. 767, Sec. 5.)

425. The employees, representatives, and inspectors of the commission may, under its order or direction, inspect and examine any books, accounts, records, memoranda, documents, papers, and correspondence kept or required to be kept by any carrier or related business referred to in this article. This section shall, to the extent deemed necessary by the

**Federal Highway Administration, DOT****§390.5**

## §390.5 Definitions.

*Charter transportation of passengers* means transportation, using a bus, of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge for the vehicle, have acquired the exclusive use of the vehicle to travel together under an itinerary either specified in advance or modified after having left the place of origin.

*Interstate commerce* means trade, traffic, or transportation in the United States which is between a place in a State and a place outside of such State (including a place outside of the United

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States) or is between two places in a State through another State or a place outside of the United States.

*Intrastate commerce* means any trade, traffic, or transportation in any State which is not described in the term “interstate commerce.”

[DOCID:usc49-296]

From the U.S. Code Online via GPO Access

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[Laws in effect as of January 16, 1996]

[Document not affected by Public Laws enacted between  
January 16, 1996 and May 14, 1998]

[CITS: 49USC13501]

TITLE 49—TRANSPORTATION

SUBTITLE IV—INTERSTATE TRANSPORTATION

PART B—MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS

CHAPTER 135—JURISDICTION

SUBCHAPTER I—MOTOR CARRIER TRANSPORTATION

Sec. 13501. General jurisdiction

The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier--

(1) between a place in--

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(Added Pub. L. 104-88, title I, Sec.103, Dec. 29, 1995. 108 Stat. 859.)

Prior Provisions

Provisions similar to those in this section were contained in section 10521 of this title prior to the general amendment of this subtitle by Pub. L. 104-88, Sec. 102(a).

Effective Date

Chapter effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104-88, see section 2 of Pub. L. 104-88, set out as a note under section 701 of this title.

Section Referred to in Other Sections

This section is referred to in sections 13102, 13502, 13712, 14504, 31501, 31502 of this title.



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[Document affected by Public Law 105-102 Section 2(8)]

[CITE: 49USC13506]

TITLE 49—TRANSPORTATION

SUBTITLE IV—INTERSTATE TRANSPORTATION

PART B—MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS

CHAPTER 135—JURISDICTION

SUBCHAPTER I—MOTOR CARRIER TRANSPORTATION

Sec. 13506. Miscellaneous motor carrier transportation exemptions

(a) In General.--Neither the Secretary nor the Board has jurisdiction under this part over-

- (1) a motor vehicle transporting only school children and teachers to or from school;
- (2) a motor vehicle providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places;
- (3) a motor vehicle owned or operated by or for a hotel and only transporting hotel patrons between the hotel and the local station of a carrier;
- (4) a motor vehicle controlled and operated by a farmer and transporting-
  - (A) the farmer's agricultural or horticultural commodities and products; or
  - (B) supplies to the farm of the farmer;
- (5) a motor vehicle controlled and operated by a cooperative association (as defined by section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) \1\ or by a federation of cooperative associations if the federation has no greater power or purposes than a cooperative association, except that if the cooperative association or federation provides transportation for compensation between a place in a State and a place in another State, or between a place in a State and another place in the same State through another State-

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\1\ So in original. Probably should be followed by another closing parenthesis.

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(A) for a nonmember that is not a farmer, cooperative association, federation, or the United States Government, the transportation (except for transportation otherwise exempt under this subchapter)-

(i) shall be limited to transportation incidental to the primary transportation operation of the cooperative association or federation and necessary for its effective performance; and

(ii) may not exceed in each fiscal year 25 percent of the total transportation of the cooperative association or federation between those places, measured by tonnage; and

(B) the transportation for all nonmembers may not exceed in each fiscal year measured by tonnage, the total transportation between those places for the cooperative association or federation and its members during that fiscal year;

(6) transportation by motor vehicle of-

(A) ordinary livestock;

Attachment D – 2 of 4

(B) agricultural or horticultural commodities (other than manufactured products thereof);

(C) commodities listed as exempt in the Commodity List incorporated in ruling numbered 107, March 19, 1953, Bureau of Motor Carriers, Interstate Commerce Commission, other than frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, or wool imported from a foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted);

(D) cooked or uncooked fish, whether breaded or not, or frozen or fresh shellfish, or byproducts thereof not intended for human consumption, other than fish or shellfish that have been treated for preserving, such as canned, smoked, pickled, spiced, corned, or kippered products; and

(E) livestock and poultry feed and agricultural seeds and plants, if such products (excluding products otherwise exempt under this paragraph) are transported to a site of agricultural production or to a business enterprise engaged in the sale to agricultural producers of goods used in agricultural production;

(7) a motor vehicle used only to distribute newspapers;

(8) (A) transportation of passengers by motor vehicle incidental to transportation by aircraft;

(B) transportation of property (including baggage) by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier or (to the extent so agreed by the United States and approved by the Secretary) by a foreign air carrier; or

(C) transportation of property by motor vehicle in lieu of transportation by aircraft because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper;

(9) the operation of a motor vehicle in a national park or national monument;

(10) a motor vehicle carrying not more than 15 individuals in a single, daily roundtrip to commute to and from work;

(11) transportation of used pallets and used empty shipping containers (including intermodal cargo containers), and other used shipping devices (other than containers or devices used in the transportation of motor vehicles or parts of motor vehicles);

(12) transportation of natural, crushed, vesicular rock to be used for decorative purposes;

(13) transportation of wood chips;

(14) brokers for motor carriers of passengers, except as provided in section 13904(d); or

(15) transportation of broken, crushed, or powdered glass.

(b) Exempt Unless Otherwise Necessary. — Except to the extent the Secretary or Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101, neither the Secretary nor the Board has jurisdiction under this part over-

(1) transportation provided entirely in a municipality, in contiguous municipalities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities, except-

(A) when the transportation is under common control, management, or arrangement for a continuous carriage or shipment to or from a place outside the municipality, municipalities, or zone; or

(B) that in transporting passengers over a route between a place in a State and a place in another State, or between a place in a State and another place in the same State through



another State, the transportation is exempt from jurisdiction under this part only if the motor carrier operating the motor vehicle also is lawfully providing intrastate transportation of passengers over the entire route under the laws of each State through which the route runs;

(2) transportation by motor vehicle provided casually, occasionally, or reciprocally but not as a regular occupation or business, except when a broker or other person sells or offers for sale passenger transportation provided by a person authorized to transport passengers by motor vehicle under an application pending, or registration issued, under this part; or

(3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

Added Pub. L. 104-88, title I, Sec. 103, Dec. 29, 1995, 109 Stat. 861.)

#### **Prior Provisions**

Provisions similar to those in this section were contained in section 10526 of this title prior to the general amendment of this subtitle by Pub. L. 104-88, Sec. 102(a).

#### **Abolition of Interstate Commerce Commission**

Interstate Commerce Commission abolished by section 101 of Pub. L. 104-88, set out as a note under section 701 of this title.

#### **Section Referred to in Other Sections**

This section is referred to in Sections 13507, 13508, 13903 of this title.

Attachment D – 4 of 4

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Re: California Bus Association's Response and Revised Proposal Regarding Regulation  
1620

Dear Freda,

Enclosed please find California Bus Association's Response and Revised Proposal to Revised Discussion for Issue Paper on Regulation 1620. In this revised proposal we have withdrawn the proposed amendment to subdivision (b)(2)(B) and replaced it with a proposed amendment to subdivision (b)(3). We believe that the new proposal properly focuses attention on the issue of whether the intent of the purchaser was to purchase a bus for use in California or outside of California.

We appreciate Staff's efforts with respect to the language which had been worked out. We were happy with that language, however, feel that the new proposal is more specific to our client's needs.

I am sending a copy of the Response by Federal Express so that it may be used to distribute to all interested persons.

Very truly yours,

BEWLEY, LASSLEBEN & MILLER, LLP

Jason C. DeMille

JCD:jas

cc: Dan Eisentrager  
Joseph A Vinatieri, Esq.

**CALIFORNIA BUS ASSOCIATION'S  
RESPONSE AND REVISED PROPOSAL TO  
REVISED DISCUSSION FOR ISSUE PAPER ON REGULATION 1620  
Interstate and Foreign Commerce**

**I. Introduction**

The goal of the California Bus Association (“Association”) in proposing an amendment to Regulation 1620(b) is to establish, with clarity, the circumstances under which its members will be subject to the use tax when those members bring a bus, which has been purchased out-of-state and first functionally used out-of-state, into California for interstate or intrastate use. The amendment is needed to create an intelligible and workable test to place everyone on notice as to what is considered to be a purchase for use in this state. A bright line test establishing when a bus will be considered purchased for use in this state will enable both industry and the Department’s auditors to determine the circumstances under which use tax will apply to buses purchased out-of-state, but used in California in both interstate and intrastate commerce.

Staff’s principal objection to the proposed amendment to Regulation 1620(b)(2)(B) is that “specific statutory authority is required to achieve the results desired by the association,” and absent a specific statutory exemption the Board of Equalization allegedly lacks the authority to amend the regulation to achieve the above-stated goal. The Association disagrees with the staff that the proposed amendment cannot be implemented in the absence of specific statutory authority. Indeed, as discussed herein, the Board of Equalization possesses broad quasi-legislative authority, clothed with a presumption of correctness, to adopt regulations necessary for the administration,

implementation and interpretation of the Sales and Use Tax Law.

After further review and discussion, the Association now believes that the proposed amendment should amend subdivision (b)(3) instead of (b)(2)(B). The true focus of attention should properly be focused on determining whether the intent of the purchaser was to purchase the bus for use in California or out of California. Resolution of this critical issue determines whether use tax is applicable in the first instance. If the property is not subject to use tax in the first instance, discussion of an exemption is irrelevant.

It is the goal of the Association to create a bright line test that will establish whether the intent of the purchaser was to purchase property for use in this state, or to purchase property for use outside of the state. Accordingly, the Association herewith withdraws its proposed amendment to Regulation 1620(b)(2)(B). In its place, the Association proposes amending Regulation 1620(b)(3) as set forth herein, to create a standard which is easy to administer and audit and which can be used to determine whether a purchaser's intent was to purchase a bus for use in California or to purchase a bus for use outside of California.

## **II. The Board Has Broad Authority to Implement, Interpret and Make Specific the Provisions of the Sales and Use Tax Law.**

As a State agency, the Board of Equalization has been given broad quasi-legislative authority to adopt regulations necessary for the administration, implementation and interpretation of the Sales and Use Tax Law. *Government Code* §11342(g) provides as follows:

“‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.”

More specifically, *Revenue and Taxation Code* §7051 gives the Board of Equalization authority to “prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part.” Indeed, the regulations that have been adopted by the Board were issued pursuant to the above grants of authority “to implement, interpret or make specific provisions of the California Sales and Use Tax Law and to aid in the administration and enforcement of that law.” (Regulation 1500(a).)

The courts have observed the following with respect to the quasi-legislative authority which has been granted to the Board:

“‘The Legislature has delegated to the Board the duty of enforcing the sales tax law, and the authority to prescribe and adopt rules and regulations. (Rev. & Tax. Code, §§7051, 7052.) Such delegation is proper even though it confers some degree of discretion on the administrative body. So long as that discretion is executed within the scope of the controlling statute, it will not be disturbed by the courts.’ It is true that the validity of an administrative ruling ... depends upon whether it is ‘consistent and not in conflict with the statute upon which it is based and reasonably necessary to effectuate the purpose of the statute.’ (Gov. Code, § 113 74.) It is also true that the final responsibility for proper interpretation of a law rests with the courts. [Citation omitted.] However, as was said in *Mission Pak Co. v. State Bd of Equalization*, 23 Cal. App. 3d 120, at page 125: ‘ . . . in making this determination with respect to the proper interpretation of a statute and the validity of an administrative ruling “the construction of a statute by officials charged with its administration ... is entitled to great weight” [citation omitted] and “if there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body.” [Citation omitted.] “The court should not substitute its judgment for that of an administrative agency which acts in a quasi-legislative capacity. . . . A court will not, therefore, superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.” [Citations omitted.] “If reasonable minds may well be divided as to the wisdom on an administrative board’s action, its action is conclusive.” [Citation omitted.]’ In addition, it has been said that an administrative ruling ‘comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating the invalidity upon the assailant.’ [Citations omitted.]” (*Action Trailer Sales, Inc. v. State Board of Equalization* (1975) 54 Cal.App.3d 125, 132-33.)

In light of this, it is apparent that the Board has broad authority and discretion in adopting regulations to implement, interpret or make specific provisions of the California Sales and Use Tax Law and to aid in the administration and enforcement of that law.

### **III. Statutory Authority for the Proposed Amendment**

The statutory authority for the proposed amendment is *Revenue and Taxation Code* §6201, which imposes the use tax “on tangible personal property purchased from any retailer ... for storage, use, or other consumption in this state.” The purpose of the proposed amendment is to further interpret and make specific what constitutes a purchase for use in this state.

Presently, Regulation 1620(b)(3) is an example of how the Board, for ease of administration and clarity, has exercised its quasi-legislative authority to create a bright line test to clarify when property is considered to have been purchased for use in this state. The 90 day test and the 6 month test are practical tests designed to ferret out where the taxpayer intended to use the property that was purchased. Both tests serve the Board’s staff and taxpayers alike by describing, in a practical and intelligible fashion, when property will be considered to have been purchased for use in this state.

Although neither the 90 day nor the 6 month test found in Regulation 1620(b)(3) have a specific statutory basis, the courts have cited the tests with approval. In *Pacific Southwest Airlines v. State Board of Equalization* (1977) 73 Cal.App.3d 32, the court noted that Section 6201’s requirement that property must be purchased for use in California “necessitates inquiry into the taxpayer’s intent and hence an examination of his first six months of ownership.” (Id. at p. 36.) In *Union Oil Company of California v. State Board of Equalization* (1963) 60 Cal. 2d 441, the court noted that “[t]he State Board of Equalization applies the “principal use” test and imposes the tax only if the item is used principally in this state during the initial year or six months following its purchase

under circumstances which reveal that it was purchased for that purpose.” (Id. at p. 451, n.7.)

The proposed amendment is but a further refinement of how the intent of the purchaser may be ascertained with respect to a purchase of buses. The intent of the purchaser is established through the use of the 90 day and 6 month test, in addition to a 50 percent or greater mileage test during the 6 month period. Just as the present regulatory language was adopted pursuant to the Board’s quasi-legislative authority, the proposed amendment is equally within the Board’s quasi-legislative authority to “implement, interpret or make specific provisions of the California Sales and Use Tax Law and to aid in the administration and enforcement of that law[,] (Regulation 1500(a)), in that it looks at certain milestones to determine whether the purchaser’s intent was to purchase the property for use in this state, or to purchase the property for use elsewhere.

#### **IV. Proposed Amendment to Regulation 1620(b)(3)**

##### **“(3) PURCHASE FOR USE IN THIS STATE.**

Property delivered outside of California to a purchaser known by the retailer to be a resident of California is regarded as having been purchased for use in this state unless a statement in writing, signed by the purchaser or the purchaser’s authorized representative, that the property was purchased for use at a designated point or points outside this state is retained by the vendor.

Notwithstanding the filing of such a statement, property purchased outside of California which is brought into California is regarded as having been purchased for use in this state if the first functional use of the property is in California. When the property is first functionally used outside of California, the property will nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless the property is used or stored outside of California one-half or more of the time during the six-month period immediately following



its entry into this state. Prior out-of-state use not exceeding 90 days from the date of purchase to the date of entry into California is of a temporary nature and is not proof of an intent that the property was purchased for use elsewhere. Prior out-of-state use In excess of 90 days from the date of purchase to the date of entry into California, exclusive of any time of shipment to California, or time of storage for shipment to California, will be accepted as proof of an intent that the property was not purchased for use in California. Buses purchased outside of California which are brought into California are regarded as having been purchased for use in this state if the first functional use of the bus is in California. When the bus is first functionally used outside of California, the bus will nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase, unless one-half or more of the miles traveled by the bus during the six month period immediately following its entry into this state are miles traveled in interstate commerce. Such use will be accepted as proof of an intent that the property was not purchased for use in California. Examples of what constitutes interstate commerce include, but are not limited, to the following:

1. A sightseeing tour bus group (charter) or regularly scheduled bus service (per capita) originates in California and travels to another state or country for a single day or several days then returns to California where the charter or schedule terminates.

2. A charter bus deadheads under contract to another state, picks up the group and operates the charter without entering the state of-California, drops the group in the other state, and deadheads back into the state of California. (Charter was quoted round trip.)

3. A charter bus group tours under contract to another state or country, for a day or several days then drops the passengers in the other state or country and then dead heads back under contract

to its terminal or next assignment.

4. A sightseeing tour bus group (charter) arrives in California via plane, train, or ship is picked up by bus and tours California for a number of days and then goes to another state or country for a number of days and the terminates service either in another state, country or California.

5. A sightseeing tour bus group (charter) or regularly scheduled bus service enters California in bus # 1, and bus # I has a road failure which causes bus #2 to continue the trip while bus #I is being mechanically repaired. Bus #2 would be in interstate commerce as a continuation intent of the character of the original trip.

6. Regularly scheduled services where a carrier operating wholly within California is picking up or feeding passengers arriving from or destined to a state or country other than California to another form of transportation be it plane, train, ship, or bus. (Example: an airport bus service or a bridge carrier for Amtrak.)

For purposes of this subparagraph “functional use” means use for the purposes for which the property was designed.”

West Sacramento  
July 2, 1999

Freda Orendt-Evans  
California State Board of Equalization  
P O Box 942879  
Sacramento, CA 94279-0040

Re: Proposed Revision to Regulation 1620, Interstate and Foreign Commerce

Dear Ms. Evans:

The California Trucking Association (CTA) appreciates the opportunity to comment to the Board of Equalization on the proposal of the California Bus Association to amend Sales and Use Tax Regulation 1620(b)(2)(B) to clarify the application of tax to vehicles used in interstate or foreign commerce. The California Bus Association has identified a continuing concern of all in the highway transportation industry: how can a trucking or bus company accurately and practically determine the taxable status of its equipment under current regulations?

The staff analysis of the California Bus Association proposal understandably focuses on the 1977 U.S. Supreme Court decision on what is permissible state taxation of property used in interstate or foreign commerce. That focus on the *permissible*, however, neglects what may be the *best* regulatory stance for the Board to adopt in the interest of these California taxpayers. The best regulatory position requires consideration of clarify and practicality; considerations that can only be achieved by standing in the shoes of the California trucking and bus industries.

The trucking industry in California, represented by CTA, accounts for 1 in every 12 California workers and \$31.5 billion in annual wages. Over 75% of California communities receive their freight by truck and by no other transportation mode. 98% of California agricultural goods, 100% of retail items, and nearly all import and export shipments are handled by truck during their journey to market. From raw material to point of sale, the average consumer product is moved seven times by truck. Trucking is interwoven into the fabric of California life.

But trucking itself has changed immeasurably since the 1977 U.S. Supreme Court decision on which the staff focuses. Those changes have substantially blurred the lines between interstate and intrastate commerce, to the point where today's trucking companies cannot consistently and practically track the nature of their equipment utilization with the pinpoint accuracy demanded by "continuous" use in interstate or foreign commerce.

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The blurring of the lines between interstate and intrastate commerce began with the federal Motor Carrier Act of 1980. That Congressional legislation substantially “deregulated” the interstate for-hire trucking industry by reducing the barriers to entry under the Interstate Commerce Commission. While addressing trucks in interstate commerce, Congress in 1980 set in motion market forces that led to the 1994 federal preemption of the intrastate economic regulation of trucking, where Congress declared Commerce Clause control over any trucking activity that affected interstate commerce. Quite simply, by removing the ICC operating authority limits and the requirement of minimum rates, Congress encouraged interstate trucking companies to expand their services geographically and to fill every cost-conscious moment with freight. Much of that freight came from intrastate markets, of which California is the largest. By self-fulfilling prophecy, that intrastate activity affected interstate commerce.

By 1994, then, shippers and receivers of freight had fourteen years’ experience with deregulated interstate carriers, who had complete operating freedom and rate flexibility. No longer did shippers need to segregate their freight by which trucking company held appropriate ICC authority. No longer were shippers stuck with a government-approved price. Shippers wanted all freight to be treated like interstate freight, and the 1994 federal preemption of intrastate regulation gave them exactly that.

From 1977 to 1994, the marketplace within which the trucking industry operates moved from a rigid system where state lines and rate levels and commodity classifications mattered to today's deregulated climate where those distinctions are largely artificial and useless for business purposes. Today, the trucking company that attempts in good faith to keep a piece of equipment “continuously” in interstate or foreign commerce has no ICC or PUC rulings to define those movements, no reinforcement from customers to distinguish interstate freight from just plain freight, and every business incentive to meet the totality of a customer’s needs. In fact, it is common today for shippers to seek trucking company bids by *volume* of freight to be handled, regardless of the exact mix of shipment origins and destinations.

In short, the conditions of 1977 have no reality in 1999. That change in the trucking marketplace does not call for an immediate change in the California sales and use statutes, as suggested by staff. Their legislative proposal is a good goal to embrace. Among the strongest points of the staff recommendation is that exemption of truck and bus equipment used principally in interstate or foreign commerce, as defined, from sales and use taxation would return to California the equipment manufacturing and sales activity that now takes place outside the state. CTA firmly believes that California would receive greater tax revenues by exempting this equipment and enlarging the state economic base.

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While the staff recommendation has appeal, the California Bus Association proposal addresses an immediate need, squares fully with marketplace realities, offers clarity and practicality in application, and finds affirmation in the 1994 view of Congress on the Commerce Clause. When Congress finds Commerce Clause support for federal preemption of intrastate regulation, declaring that intrastate activity affects interstate commerce, there is created a broader protection for interstate commerce than afforded by the narrow exemption for "continuous" use.

CTA would suggest one small change in the California Bus Association proposal. The California Bus Association would utilize mileage to calculate the degree of use in interstate or foreign commerce. Staff would utilize time. CTA notes that mileage has been accepted as a surrogate for time (see the International Registration Plan (IRP), of which California is a member), but suggests that vehicle "time in use" and "lease contract revenues" be added as alternative means to calculate the degree of use in interstate or foreign commerce. Truck rental and leasing firms, as an example, are allowed under the IRP to offer their business account records as proof of where operations were conducted, while specialized trucking operations, such as mobile cranes, keep close track of "time in use" at work sites. By allowing these alternative means of calculation, no truck or bus operation should be disadvantaged.

The California Trucking Association supports the California Bus Association proposal, with our suggested additions. Thank you for your consideration of our comments.

Yours truly,

Warren E. Hoemann  
Vice President

WEH/pb

## **Sales and Use Tax Advisors of California, Incorporated**

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July 2, 1999

California State Board of Equalization  
PO Box 742879  
Sacramento, CA 94279-0001

Attention: Freda Orendt-Evans  
MIC: 92

Re: Regulation 1620

Dear Freda:

Taxpayers feel the Board's staff has been inconsistent when determining if a vehicle, vessel or aircraft are purchased for use in state or out of state.

This inconsistency centers on how different Districts (even different personnel within a District) count days of in state use and out of state use. Changes have been proposed to Regulation 1620, which should create firm guidelines to be used. These proposed changes are limited to only one type, sightseeing buses.

All of the problems that exist for how days are counted for sightseeing buses also exist for all other types of vehicles as well as for vessels and aircraft. Staffs inconsistent methods of counting days is not limited to Regulation 1620(b)(2), it also applies to Regulation 1620(b)(3).

I believe the changes to Regulation 1620 should apply to all vehicle, vessel or aircraft, which are brought into the state within 90 days of the purchase date, thereafter partially used in state, and partially used out of state. By making one change to Regulation 1620, which applies, to all vehicle, vessel or aircraft, you eliminate all inconsistent treatment by the staff.

If you have any questions, please call me at 916-988-1917.

Respectfully,

Sales and Use Tax Advisors  
of California, Incorporated

Paul E. Nelson  
President

PEN:ckj



## Proposed Legislation

6368.8 There are exempted from the taxes imposed by this part the gross receipts from the sale of, and storage, use, or other consumption in this state of a bus as defined in Vehicle Code section 233, used principally in interstate or foreign commerce involving the transportation of property or persons for hire. A bus is used principally in interstate or foreign commerce if, during the first six consecutive months commencing with the first operational use of the bus, more than one-half of the operational use is use in interstate or foreign commerce. Operational use means the use measured by mileage during which the bus is operated and shall not include mileage for storage, modification, repair, or replacement.

6368.9 There are exempted from the taxes imposed by this part the gross receipts from the sale of, and storage, use, or other consumption in this state of trucks, truck tractors, semi-trailers, or trailers, any of which has an unladen weight of 6,000 pounds or more, used principally in interstate or foreign commerce involving the transportation of property for hire. Such vehicles are used principally in interstate or foreign commerce if, during the first six consecutive months commencing with the first operational use of the vehicle, more than one-half of the operational use is use in interstate or foreign commerce. Operational use means the use measured by mileage during which the vehicle is operated and shall not include mileage for storage, modification, repair, or replacement.



Reg 1620(b)(2)(B).

Use tax does not apply to the use of property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used ~~continuously~~ primarily in interstate or foreign commerce both within and without California and not exclusively in California. The use of property, including a vehicle, that is purchased for use in California under subdivision (b)(3) of this regulation, is nevertheless exempt from tax if the property is purchased for use, and used, in interstate or foreign commerce prior to its entry into this state, and is thereafter used primarily in interstate or foreign commerce both within and without California.

Property is “used primarily in interstate or foreign commerce” if, during the six-month period immediately following its first entry into California, it is used in interstate or foreign commerce more than one-half the time that it is used. A vehicle will also be regarded as “used primarily in interstate or foreign commerce” if, during the six-month period immediately following its first entry into California, more than one-half of the miles traveled by the vehicle during that six-month period are miles traveled in interstate or foreign commerce.

For the use of property to qualify for the exemption, it must satisfy all the elements of the exemption, one of which is whether the use is in interstate or foreign commerce.

Examples of what constitutes use in interstate or foreign commerce for purposes of that portion of the test include, but are not limited to, the following:

1. A bus or truck is dispatched empty from another state or country to California, or from California to another state or country, to pick up a specific payload, and the payload then is transported to its destination, which may be within the borders of that state or country. (Example: Truck dispatched empty from Sacramento, CA to Reno, NV to transport specific cargo from Reno, NV to Elko, NV.)
2. A truck or bus transports cargo or passengers between California and another state or country, or between two places within California travelling through another state or country. (Example: Bus carries passengers between Reno, NV and Sacramento, CA or from Truckee, CA to Bishop, CA travelling through Nevada.)
3. A carrier operating wholly within California has regularly scheduled service picking up or feeding passengers arriving from or destined to another state or country to another form of transportation, be it plane, train, ship, or bus. (Example: Passengers, upon arriving at a California airport on an out-of-state flight, use an airport bus service or a bridge carrier for Amtrak to go to a bus or Amtrak station to then travel by bus or train to their destination in California.)
4. A truck picks up cargo from a carrier that brought the cargo into California from another state or country, and transports the cargo solely within California to its destination in California.

Examples of what do not constitute use in interstate or foreign commerce include, but are not limited to, the following:

1. A bus or truck which has not been dispatched to pick up any specific payload and which carries no passengers or cargo travels from another state or country to California, or travels from California to another state or country. (Example: Bus deadheads back into California after taking tour group from California to another state where tour ended.)
2. A bus or truck is used to replace another bus or truck that had entered California carrying passengers or cargo from another state or country, where the replacement was necessary because of mechanical problems of the vehicle that had entered California, and the replacement bus or truck transports passengers or cargo within California, never leaving the state.
3. A truck transports cargo, which had been shipped by another carrier to a California warehouse from another state or country, from the warehouse to another place within California, never leaving the state.
4. A tour bus travels entirely within California carrying a tour group that contracted for the tour in another state or country and that traveled to California via plane, train, or ship from another state or country.